(14,820.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 278.

JOEL PARKER WHITNEY, PLAINTIFF IN ERROR,

vs.

FRANK C. TAYLOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 *Complaint.*

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

The plaintiff complains of defendant and alleges—

1.

That this cause of action arises under the laws of the United States, as is hereinafter particularly shown, and the value of the land subject of suit exceeds the sum of five thousand dollars and is of the value of eight thousand dollars, and the rents and profits of said land *is* one thousand dollars per annum.

2.

That the Central Pacific Railroad Company is, on the 23 day of June, 1870, was, and at all times since has been a corporation created by and existing under the laws of the State of California as such, and at all times hereinafter mention- prior to said date was a duly created corporation of said State, existing under the laws thereof as the "Central Pacific Railroad Company of California;" and the said Central Pacific Railroad Company, on the 23rd June, 1870, succeeded to and became vested with all the lands, property, and rights of the said Central Pacific Railroad Company of California.

2 III.

That by an act of Congress of the United States approved 1st July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," the said Central Pacific Railroad Company of California was authorized "to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California;" and it was by the said statute enacted "that there be, and is hereby, granted to the said company for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate section- per mile on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: Provided that all mineral lands shall be excepted from the operation of this act."

IV.

That said company filed its assent, under its seal, to the said act of Congress in the Department of Interior of the United States within two months after the passage of said act, and within the same time filed in the said Department of Interior a map designating the general route of said railroad.

3 And the Secretary of Interior of the United States on the 2nd August, 1862, caused the lands within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale.

That said designated route extended through and the said withdrawal embraced all the lands contained in the township known and designated according to United States Government surveys thereof as township 12 north, range 7 east, Mount Diablo base and meridian.

V.

That the line of said railroad from the commencement point named in the said act of Congress to a point fifty miles eastward thereof and through and beyond the said township 12 north, range 7 east, was definitely fixed prior to the 26th March, 1864, and was actual- constructed, operated for the service contemplated by said act, duly examined by commissioners appointed by the President of the United States, and was by them duly reported and certified as completed and equipped in all respects as required by the said act of Congress, and accepted by the President of the United States as completed and equipped in all respects as required by the said act, prior to the 9th September, 1864; that at least twenty-five miles of said railroad extending eastward from the 50-miles point aforesaid was so definitely fixed, actually constructed and operated each year thereafter, and the entire railroad, extending from the said commencement point to the west line of the State of Nevada, was so definitely fixed and actually constructed and operated prior to the 2nd July, 1868, and was duly accepted in three several sections thereof, respectively, on the 28th September, 1866; the

4 24th October, 1867, and 9th July, 1868.

VI.

That in the year 1856 the Secretary of Interior of the United States caused all the lands in said township 12 north, range 7 east, to be surveyed, and on the 18th April, 1856, the United States surveyor general for the State of California made due return of the official plat of said survey and caused the same to be filed in the General Land Office of the United States at Washington, and during the year 1856 caused the same to be filed in the local land office of the United States at Marysville, California, the same being the local land office of the United States for the lands subject of sale within that certain land subdivision of the State of California which included the lands of said township 12 north, range 7 east.

That by said survey the description- of all the lands of said town-

ship were ascertained and the character thereof determined to be agricultural lands, not mineral or swamp in character, nor covered by any Government reservation, and the plats filed as aforesaid so reported and showed the same.

VII.

That section 33, in said township 12 north, range — east, is within the limits of five miles of said railroad along the line thereof, and with other lands was granted to the said Central Pacific Railroad Company of California by the act of Congress aforesaid.

That at the date of the passage of said act of Congress, at the date when the line of said railroad was definitely fixed, and at the
5 date when the said railroad was actually constructed through and beyond the said township, all of said section 33 was returned as agricultural land and no part of the same was mineral land or returned or denominated as mineral land, nor had any part of the same been sold, reserved, or otherwise disposed of by the United States, nor had any pre-emption or homestead claim attached to the same, nor was any part of said section within any exception from said land grant, nor did the granting thereof to said company defeate or impair any pre-emption, homestead, swamp land or other lawful claim to the same or to any part thereof.

VIII.

That on the 28th May, 1857, more than ninety days after the filing of the official plat of the said township 12 north, range 7 east, in the United States land office at Marysville, California, one H. H. Jones filed his declaratory statement in said land office for the southeast quarter of section 33 of said township, claiming the same under the pre-emption acts of Congress.

That said Jones did not at any time reside on, cultivate, or improved, or make a settlement in person upon said tract or any part thereof, nor did he make entry of or payment for the same within the time allowed by law or at all.

That thereafter suit was instituted in the proper United States land office by the Central Pacific Railroad Company against the said H. H. Jones and to procure cancellation of the said declaratory statement, and such proceedings were duly had therein that by its judgment rendered the 4th December, 1885, the Land Department of the United States finally determined that the said H. H. Jones never at any time lived on the said tract nor ever made a settlement in person thereon, and decided that his said declaratory statement was invalid and void, and on the 23rd January, 1886, can-
6 celled and vacated the same.

IX.

That in virtue of the said act of Congress and compliance by the said Central Pacific Railroad Company of California with all the conditions and requirements imposed by said act, as hereinbefore set forth, and by completion on the — day of September, 1864, of the

section of railroad mentioned and described in division VII of this complaint the said company became vested, as of the date of the passage of said act of Congress, with title in fee to the whole of said section 33; and upon the certification by the commissioners, particularly set forth in said division VII, the said company became entitled to have documentary evidence of its title by letters patent issue to it for the same, and said title and right of the Central Pacific Railroad Company of California passed to and became vested in the Central Pacific Railroad Company, as hereinbefore particularly set forth.

X.

That of said section 33 the north half and southwest quarter have been duly patented to the said Central Pacific Railroad Company, and said company has duly selected the southeast quarter of said section and has duly tendered payment into the Treasury of the United States of the cost of surveying, selecting, and patenting the same, and the said company has performed all acts necessary to entitle it to have patent issue to it for the same, and has demanded such issue, but that the issue thereof has been delayed and is obstructed by the defendant.

XI.

7 That on the — day of August, 1888, plaintiff, under and by virtue of mesne conveyances from the said Central Pacific Railroad Company, was seized in fee and entitled to possession and was in the actual possession of said southeast quarter of section 33, in township 12 north, range 7 east, Mount Diablo base and meridian.

XII.

That while the plaintiff was so as aforesaid the owner of and entitled to the possession of and in the actual possession of said southeast quarter of section 33 the defendant wrongfully and without right or title and against the will and consent of plaintiff entered into and upon the same and ousted the plaintiff therefrom, and ever since has withheld and still withholds the possession thereof from plaintiff, to his, plaintiff's, damage in the sum of one thousand dollars.

That the continued withholding of said premises from plaintiff will cause him damage in the sum of one hundred dollars per month for each and every month that the same is so withheld.

Wherefore plaintiff prays judgment against defendant for the restituiton of the demanded premises and for one thousand dollars damages, and for further damages in the sum of one hundrd dollars for each and every month that said premises shall be withheld from and after the filing of this complaint, and for costs of suit.

A. P. CATLIN,
Attorney for Plaintiff, Sacramento, Cal.

8 STATE OF CALIFORNIA, } ss:
County of Sacramento, }

James E. Whitney, being duly sworn, says that he is the agent of Joel Parker Whitney, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and that as to those matters he believes it to be true. Affiant makes this affidavit because the said plaintiff is absent from the State of California.

JAMES G. WHITNEY.

Subscribed and sworn to before me this 27th day of April, 1889.
[SEAL.] G. G. PICKETT,
Notary Public.

(Endorsed:) Filed May 1st, 1889. L. S. B. Sawyer, clerk.

9 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOEL PARKER WHITNEY, Plaintiff, }
vs.
FRANK C. TAYLOR, Defendant. }

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

The President of the United States of America to Frank C. Taylor, defendant, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit in and for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to recover from the defendant the possession of the southeast ¼ of section 33, in township 12 north, range 7 east, M. D. B. M., and $1,000 damages for withholding the same from plaintiff, and the further sum of $100 per month for damages for the further withholding of the same, and for costs of suit. The plaintiff avers that on the — day of August, 1888, he was the owner in fee of said land and in the actual possession of the same,

and that on that day the defendant unlawfully ousted him therefrom, and ever since has withheld said land from him to his damage as aforesaid. The plaintiff also avers that his cause of action arises under the laws of the United States, and that said land is of the value of $8,000, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the Honorable Melville W. Fuller, Chief Justice [SEAL.] of the Supreme Court of the United States, this 1st day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 113th.

L. S. B. SAWYER, *Clerk*,
By —— ——, *Deputy Clerk.*

10 Endorsed: No. 10355. U. S. circuit court, ninth circuit, district of California. Joel Parker Whitney *vs.* Frank C. Taylor. Summons. A. P. Catlin, Esq., plaintiff's attorney. Filed May 6th, 1889. L. S. B. Sawyer, clerk, by —— ——, deputy clerk.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the second day of May, 1889, and personally served the same on the fourth day of May, 1889, by delivering to and leaving with Frank C. Taylor, at Placer county, said defendant named therein, personally, at the county of Placer, in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the U. S. circuit —, N. dist. Cala., attached thereto.

J. C. FRANKS, *U. S. Marshal*,
By W. W. PRESBURY, *Deputy.*

San Francisco, May 6, 1889.

11 *Demurrer to Complaint.*

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

Comes now the defendant and demurs to the plaintiff's complaint and assigns as grounds of demurrer:

I.

Said complaint does not state facts sufficient to constitute a cause of action.

II.

It appears upon the face of the complaint that on May 28, 1857, prior to the passage of the act of Congress referred to in the com-

plaint, a pre-emption claim had attached to the land described in the complaint in this, that one H. H. Jones filed his declaratory statement in the United States land office at Marysville for the land described in the complaint.

III.

It appears upon the face of the complaint that the land described therein was excepted by the description contained in said act of Congress, referred to in said complaint, from the operation of said act.

12 IV.

That plaintiff has no title to the land described in the complaint sufficient to maintain this action.

V.

That the court has no jurisdiction of the subject of the action.

Wherefore defendant prays judgment for his costs.

ROBERT T. DEVLIN,
Attorney for Defendant.

I hereby certify that the above demurrer to the plaintiff's complaint is, in my opinion, well founded in point of law.

ROBERT T. DEVLIN,
Attorney and Counsel for Defendant.

Endorsed: Due service by copy of the within demurrer admitted this 29 day of May, 1889. A. P. Catlin, attorney for pl'ff. Filed May 31st, 1889. L. S. B. Sawyer, clerk.

13 *Order Sustaining Demurrer, &c.*

At a stated term, to wit, the July term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 23rd day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge.

J. P. WHITNEY
vs.
FRANK C. TAYLOR. } No. 10355.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer to the complaint herein, having been duly considered, it is ordered that said demurrer be, and the same hereby is, sustained as to jurisdictional facts, with leave to the plaintiff to amend said complaint after ten days' notice on the payment of twenty dollars.

[Endorsed:] No. 10355. U. S. circuit court, ninth circuit, northern district of California. J. P. Whitney *vs.* Frank C. Taylor. Copy of order sustaining demurrer.

14 *Amended Complaint.*

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

Now comes the plaintiff and by leave of the court files this his amended complaint against the defendant and alleges:

1.

That this cause of action arises under the laws of the United States, as is hereinafter particularly shown, and the value of the land sued for is eight thousand dollars and upwards, and the rents and profits of said land are of the value of one thousand dollars per annum.

2.

That the Central Pacific Railroad Company is, on the 23rd day of June, 1870, was, and at all times since has been a corporation created by and existing under the laws of the State of California as such, and at all times hereinafter mentioned prior to said date was a duly created corporation of said State, existing under the laws thereof as the "Central Pacific Railroad Company of California," and the said "Central Pacific Railroad Company" on the 23rd day of June, 1870, succeeded to and became vested with all the land, property, and rights of the said Central Pacific Railroad Company of California.

3.

That by an act of the Congress of the United States approved 1st July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal,
15 military, and other purposes," the said Central Pacific Railroad Company of California was authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco or the navigable waters of the Sacramento river to the eastern boundary of California, and it was by the said statute enacted "that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof and within the limits of ten miles on each

side of said road not sold, reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of said railroad is definitely fixed: Provided that all mineral lands shall be excepted from the operation of this act."

4.

That said company filed its assent under its seal to the said act of Congress in the Department of the Interior of the United States within two months after the passage of said act and within the same time filed in the said department a map designating the general route of said railroad.

And the Secretary of the Interior of the United States on the 2d day of August, 1862, caused the lands within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale.

That said designated route extended through and the said withdrawal embraced all the lands contained in the township known and designated according to United States Government surveys thereof as township 12 north, range 7 east, Mount Diablo base and meridian.

16 5.

That the line of said railroad from the commencement named in the said act of Congress to a point fifty miles eastward thereof and through and beyond the said township 12 north, range 7 east, was definitely fixed prior to the 26th day of March, 1864, and was actually constructed — operated for the services contemplated by said act, duly examined by commissioners appointed by the United States, and was by them duly reported and certified as completed and equipped in all respects as required by the said act of Congress and accepted by the President of the United States and completed and equipped in all respects as required by the said act prior to the 9th day of September, 1864; that at least 25 miles of said railroad extending eastward from the fifty-miles point aforesaid was so definitely fixed, actually constructed, and operated each year thereafter, and the entire railroad extending from the said commencement point to the west line of the State of Nevada was so definitely fixed and actually constructed and operated prior to the 2nd of July, 1868, and was duly accepted in three several sections thereof respectively on the 26th of September, 1866, the 24th of October, 1867, and the ninth of July, 1868.

6.

That in the year 1856 the Secretary of the Interior of the United States caused all the lands in the said township 12 north, range 7 east, to be surveyed, and on the 18th day of April, 1856, the United States surveyor general for the State of California made due return of the official plat of said survey and caused the same to be filed in the General Land Office of the United States at Washington, and during the year 1856 caused the same to be filed in the local land

office of the United States at Marysville, California, the same then being the local land office of the district within which the said lands are situated; that by said survey and the said plat the descriptions of all the lands of said township were ascertained and the character thereof determined to be agricultural land, not
17 mineral or swamp in character, nor covered by any Government reservation.

7.

That section 33, in said township 12 north, range 7 east, is within the limits of five miles of said railroad along the line thereof, and with other lands *are* granted to the said Central Railroad Company of California by the act of Congress aforesaid.

That at the date of the passage of said act of Congress and at the date when the line of said railroad was definitely fixed and at the date when the said railroad was actually constructed through and beyond the said township all of said section 33 was returned as agricultural land and no part of the same was mineral land or returned or denominated as mineral land, nor had any part of the same been sold, reserved, or otherwise disposed of by the United States, nor had any pre-emption or homestead claim attached to the same or to any part thereof, nor was any part of said section within any exception from said grant, nor did the granting thereof to said company defeat or impair any pre-emption, homestead, swamp land, or other lawful claim to the same or any part thereof.

8.

That on the 28th day of May, 1857, more than ninety days after the filing of the official plat of the said township 12 north, range 7 east, in the United States land office at Marysville, as hereinbefore stated, one H. H. Jones filed his declaratory statement in said land office for the demanded premises, to wit, the southeast one-quarter of said section 33 of said township, claiming the same under the pre-emption laws of the United States.

That the said Jones did not at any time reside on, cultivate, or improve or make a settlement in person upon said southeast quarter of said section 33 or any part thereof, nor did he ever make entry of or payment for the same or any part thereof within the time required by law or at all.

18 That thereafter suit was instituted in the proper United States Land Office by the Central Pacific Railroad Company against the said H. H. Jones and to procure the cancellation of the said declaratory statement, and such proceedings were duly had therein that by its judgment rendered the 4th day of December, 1885, the Land Department of the United States finally determined that the said H. H. Jones never at any time lived on the said tract of — and never made a settlement in person thereon, and decided that his declaratory statement was invalid and void from its beginning, and on the 23rd of January, 1886, cancelled and vacated the same.

9.

That in virtue of said of Congress and compliance of the said Central Pacific Railroad Company of California with all the conditions and requirements imposed by said act, as hereinbefore set forth, and by completion on the 9th day of September, 1864, of the sections of railroad mentioned and described in the 5th division of this complaint the said company became vested, as of the date of the passage of said act of Congress, with title in fee to the whole of said section 33, and upon the certification by the commissioners, particularly set forth in said division 5, the said company became entitled to have documentary evidence of its title by letters patent to it for the same, and said title and right of the Central Pacific Railroad Company of California passed to and vested in the Central Pacific Railroad Company, as hereinbefore particulary set forth.

10.

That of said section 33 the north half and southwest quarter have been duly patented to the said Central Pacific Railroad Company, and the said company has duly selected the southeast quarter of said section and has duly tendered payment into the Treasury of the United States of the cost of surveying, selecting, and patenting
19 the same, and the said company has performed all acts required by law and all acts necessary to entitle it to have a patent issued to it by the United States for the same and has demanded the issuing of such patent, but the issue thereof has been delayed and is obstructed and prevented by the defendant by reason of the homestead claim to said land hereinafter particularly described.

11.

That on the — day of August, 1888, plaintiff, under and by virtue of mesne conveyances from the said Central Pacific Railroad Company, was seized in fee and entitled to the possession and was in the actual possession of said southeast quarter of said section 33, in township 12 north, range 7 east, and while he was so the owner of and entitled to the possession of and in the actual possession of said land the defendant wrongfully and without right or title and against the will and consent of plaintiff entered into and upon the same and ousted the plaintiff therefrom, and ever since has withheld and still withholds the possession thereof from plaintiff, to his, plaintiff's, damage in the sum of one thousand dollars; that the continued witholding of said premises from plaintiff will cause him damage in the sum of one hundred dollars per month for each and every month that the same is so withheld.

12.

That said defendant, on the 28th day of August, 1888, filed in the United States land office at Sacramento, California, in the district of which office said land was then and now is situated, his application to enter said tract of land in pursuance of sections 2289 and

2290 of the Revised Statutes of the United States, relating to homesteads, and, being a person qualified under said homestead laws to make a homestead entry and having payed the fees required by law in such cases, his said application was thereupon approved by the register and receiver of said land office.

20 Plaintiff avers that defendant entered into and upon said land and ousted plaintiff therefrom, as hereinbefore stated, under a claim of right so to do under and by virtue of the aforesaid homestead entry made by him as aforesaid, and claims that said land was open, under the homestead laws of the United States, to entry by him, and that by reason of the pre-emption filing of said H. H. Jones hereinbefore mentioned the said Central Pacific Railroad Company never acquired any right, title, or interest in or to said land. Plaintiff claims and avers that said filing by said Jones did not create any claim which attached to said land within the meaning of the act of Congress of July 1st, 1862, hereinbefore mentioned.

Wherefore plaintiff prays judgment against defendant for restitution of said lands and for $1,000 damages, and for further damages in the sum of $100 for each and every month that said lands shall be withheld from and after the filing of the original complaint herein and costs of suit.

A. P. CATLIN,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
County of Sacramento, } ss:

A. P. Catlin, being duly sworn, says that he is the attorney in this action of the plaintiff and resides in the city of Sacramento; that the plaintiff is absent from the State of California, and therefore deponent makes this affidavit. Deponent has read the foregoing complaint and knows the contents thereof, and says the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

A. P. CATLIN.

Subscribed and sworn to before me this 4th day of November, 1889.

W. H. HANLON,
[SEAL.] *Notary Public.*

21 Endorsed: Due and timely service of copy of within admitted this 4th day of November, 1889. Rob't T. Devlin, per W. H. D., attorney for defendant. Filed November 5th, 1889. L. S. B. Sawyer, clerk.

22 *Demurrer to Amended Complaint.*

In the Circuit Court of the United States, Ninth Circuit, for the Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

Comes now defendant and demurs to plaintiff's amended complaint and assigns as grounds of demurrer:

I.

Said amended complaint does not state facts sufficient to constitute a cause of action.

II.

Said amended complaint shows that the court has no jurisdiction over the subject-matter of the action.

III.

The said amended complaint shows that the cause of action stated does not arise under the laws of the United States.

IV.

It appears upon the face of the complaint that on May 28, 1857, prior to the passage of the act of Congress referred to in the complaint, a pre-em-tion claim had attached to the land described in the complaint, in this, that one H. H. Jones filed his declaratory statement in the United States land office at Marysville.

V.

It appears upon the face of the complaint that the land described therein was excepted by the description contained
23 in said act of Congress referred to in said complaint from the operation of said act.

VI.

That plaintiff has no title to the land described in the complaint sufficient to maintain this action.

VII.

Because it appears that the United States land office at Sacramento and the Land Department of the United States had acquired jurisdiction over the subject-matter of this action before the commencement hereof and still retains such jurisdiction.

Wherefore defendant prays judgment for his costs.

ROB'T T. DEVLIN,
Attorney for Defendant.

I hereby certify that the above demurrer to the plaintiff's amended complaint is, in my opinion, well founded in point of law.

ROB'T T. DEVLIN,
Attorney and Counsel for Defendant.

(Endorsed:) Due service by copy of the within demurrer admitted this 13th day of November, 1889. A. P. Catlin, attorney for plaintiff. Filed Nov. 13th, 1889. L. S. B. Sawyer, clerk.

24 At a stated term, to wit, the February term, A. D. 1890, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, United States district judge, district of Nevada.

Order Overruling Demurrer, &c.

J. P. WHITNEY
vs.
FRANK C. TAYLOR. } No. 10355.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer to the amended complaint herein, having been duly considered, it is ordered that said demurrer be, and the same hereby is, overruled, with leave to defendant to answer herein on judgment of twenty dollars costs.

[Endorsed:] No. 10355. U. S. circuit court, ninth circuit, northern district of California. J. P. Whitney *vs.* Frank C. Taylor. Copy of order overruling demurrer. Filed ——, —, 189–. ——, clerk, by ——, deputy clerk.

Attest my hand and the seal of said circuit court this — day of ——, A. D. 189–.

——, *Clerk*,
By ——,
Deputy Clerk.

25 *Answer.*

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

Comes now the defendant above-named and answers plaintiff's amended complaint and admits, denies, and avers as follows, to wit:

I.

Denies that the cause of action stated in said complaint arises under the laws of the United States; denies that the value of the land sued for is eight thousand dollars or of any greater sum than four thousand dollars; denies that the rents and profits or rents or profits of said land are of the value of one thousand dollars per annum or of any greater value than fifty dollars per annum.

II.

Avers that he has no information or belief upon the subject sufficient to enable him to answer the allegation "that said company filed its assent under its seal to the said act of Congress in the Department of the Interior of the United States within two
26 months after the passage of said act and within the same time filed in the said department a map designating the general route of said railroad," and therefore he denies that said company mentioned in the complaint filed its assent under seal or otherwise or at all to the act of Congress described in the said complaint or any part thereof in the Department of the Interior of the United States or in any department or at all within two months after the passage of said act or at any time or at all; denies that at the same time or within the same time or at any time or at all the said company filed in the said department or any department a map designating the general or any route of the railroad described in the complaint, or any part thereof.

III.

Avers that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in the sixth paragraph of plaintiff's said complaint, and therefore he denies that in the year 1856 or at any time the Secretary of the Interior of the United States or other officer caused all or any of the lands in township 12 north, range 7 east, to be surveyed; denies that on the 18th day of April, 1856, the United States surveyor general for the State of California, or other officer, made due return or any return of the official or other plat of said survey; denies that he caused the same to be filed in the General Land Office of the United States, at Washington, or elsewhere; denies that in the year 1856 or at any time or at all he caused the same to be filed in the local land office of the United States at Marysville or elsewhere; denies that by
27 said survey or any survey and the said plat or any plat the descriptions of all or any of the lands of said township were ascertained, or that the character thereof was determined to be agricultural land; denies that the character thereof was thereby or at all determined to be not mineral or swamp nor covered by any Government reservation; denies that the surveyor general or any officer ever made any return of said land as agricultural or as mineral land, and that the plats or any plats made by him or under his direction do not show whether said land was or is agricultural or mineral land; avers that said land and all lands in said town-

ship are not shown to be agricultural land or mineral land by any official plats filed in any office prior to the year 1870.

IV.

Admits that said section 33, in township 12 north, range 7 east, is within the limits of five miles of said railroad along the line thereof, but denies that the southeast quarter of said section, or any part thereof, is or ever was granted to the Central Pacific Railroad Company of California or to any other person or corporation whatever under whom plaintiff derives any claim or title; avers that the United States of America have never granted the same to any person, but have issued a final receipt to the defendant, which makes him the equitable owner thereof and entitles him to a patent; denies that at the date of the passage of said act of Congress, or at the date when the line of said railroad was definitely fixed, or at the date when said railroad was constructed through or beyond said section, or at any time prior to the year 1870, all or any portion of said section 33 was returned as agricultural land, or no part of the same was returned or denominated as agricultural land; denies that no pre-emption claim had attached to the same or any
28 part thereof; avers that in the year 1857 a pre-emption claim had attached to the southeast quarter of said section and thereby the same was excepted from the operation of said grant; avers that on the 28th day of May, 1857, one Henry H. Jones, being a person duly qualified under the laws of the United States to make a pre-emption entry and filing, and having paid the fees required by law in such cases, filed his pre-emption declaratory statement in the United States land office at Marysville, the same having then jurisdiction over the land, for the demanded premises; which said declaratory statement is in the words and figures following, to wit:

"I, Henry H. Jones, of Placer county, being an American citizen over the age of twenty-one years and a single man, have, on the 16th day of January, 1854, settled and improved the southeast quarter of section No. thirty-three, 33, of township No. twelve north, 12 N., of range No. seven east, 7 E., Mt. Diablo meridian, in the district of lands subject to sale at the land office at Marysville, California, containing one hundred and sixty acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of an act of Congress of 3rd day of March, 1853.

Witness my hand this 22nd day of May, A. D. 1857.

HENRY H. JONES.

In presence of—
V. E. REMINGTON."

Which said declaratory statement is endorsed: "Henry H. Jones, Placer county. Dec. filed 28 May, 1857. 16 Jan., 1854. S. E. ¼ sec. 33, 12 N., 7 E."

29 Which said pre-emption declaratory statement was duly noted in volume 3 of Tract Books, page 50, in the United States land office at Sacramento, having been thereto transferred from the United States land office at Marysville, and which was also duly noted on the official plat of survey in the United States land office at Sacramento, all of said notes having been duly made prior to the passage of the act mentioned in said complaint.

Admits that thereafter suit was instituted in the proper United States land office by the Central Pacific Railroad Company against the said H. H. Jones, and admits that such proceedings were duly had therein that by its judgment, rendered the fourth day of December, 1885, the register and receiver of the land office at Sacramento decided that the said declaratory statement should be cancelled, but avers that they did not decide that the same was invalid or void from the beginning, their decision being in the words and figures following:

"From an examination of the evidence in this case we find that the allegations made by affiants Mitchell and Phelan are practically substantiated by the evidence, and we therefore recommend the cancellation of pre-emption declaratory statement No. 747, in the name of H. H. Jones, for the S. E. ¼ of section 33, t'p 12 N., R. 7 E., M. D. B. & M.

ED. F. TAYLOR, *Register.*
CHAS. F. GARDNER, *Receiver.*"

Avers that thereafter and in due time the record in the case and suit mentioned in the complaint was duly transmitted to the Commissioner of the General Land Office, at Washington, D. C., who, on the 23rd day of January, 1886, duly gave and made his decision in words and figures following:

30 F. 1885. 121,049.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y* 23, 1886.

Register and receiver, Sacramento, California.

GENTLEMEN: I am in receipt of register's letter of December 4, 1885, transmitting record in the case of Central Pacific Railroad Company *v.* H. H. Jones, involving the S. E. ¼ sec. 33, twp. 12 N., R. 7 E., M. D. M.

Said tract is within the limits of the grant of July 1, 1862, to the company named (12 Stat., 489), as shown by the map designating the route of said company's road, filed in this office June 30, 1862, in accordance with which lands were ordered withdrawn by letter of Aug. 2, 1862, which reached the local office Sept. 12th following.

The map of definite location of said railroad was filed in this department M'ch 26, 1864, said map showing the location of the first division (50 miles) east from Sacramento.

The township plat was filed in the local office in the year 1856.

The records show that H. H. Jones filed pre-emption declaratory statement No. 747, Marysville series, on the land in question May 28th, 1857, alleging settlement thereon Jan'y 16, 1854. Said filing stands intact upon the records, and it was to procure the cancellation of the same that this contest was instituted by the C. P. R. R. Co.

31 It also appears that one Henry A. Davis filed D. S. No. 117 on said tract April 10, 1868, alleging settlement June 10, 1867, and said filing remains intact; also Andrew Caldwell filed D. S. No. 1616 on the S. ½ S. E. ¼ of the section specified Aug. 20, 1870, alleging settlement Aug. 8, 1862, which filing was cancelled for abandonment Nov. 10, 1873.

A hearing was had in this case on Sept. 21, 1885, and upon the testimony adduced thereat you decided, in effect, that H. H. Jones never lived on the land and that his filing should be cancelled.

Attached to your decision is the register's certificate stating that the time allowed for appeal therefrom had expired and no appeal taken. Said decision has therefore become, and is hereby, declared final.

Independent of said hearing and decision, Jones' filing is subject to cancellation, as is also that of Henry A. Davis, hereinbefore referred to, both filings having expired by limitation.

I have therefore cancelled said filings, and you will make the proper annotations upon your records, referring to this letter by initial and date.

At the date when the route of the C. P. R. R. Co. was definitely fixed a pre-emption claim had attached thereto, that of Jones, and, as the grant to said company expressly provided that lands to which a pre-emption claim had not attached were granted, it follows that lands to which such a claim had then attached were not granted. (K. P. R. R. Co. *v.* Dunmeyer, 113 U. S., 629, and U. S. *v.* U. P. R. R. Co., 12 Copp, 161.)

32 That Jones' claim has been found to have been abandoned or invalid cannot operate to the railroad company's advantage, for the granting act did not provide that lands to which an unabandoned or valid pre-emption claim may not have attached were granted, but only that lands to which a pre-emption claim may not have attached were granted. The claim of Jones had attached when the railroad was definitely located, and, whether valid or invalid, excepted the land from the grant. (B. & M. R. R. Co. *v.* Abink, 14 Neb. Rep., 95; see also office decisions of the 22nd inst., cases of C. P. R. R. Co. *vs.* Beck, involving land in your district).

The tract in question is therefore held to be subject to disposal as public land, subject to appeal by the company named within 60 days.

The resident attorney for said company will be notified hereof by this office.

Very respectfully,

(Signed) WM. A. J. SPARKS,
Commissioner.

Avers that on appeal the Secretary of the Interior duly affirmed this decision by letter dated July 17, 1888, which in words and figures is as follows, to wit:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July* 17, 1888.

Vol. 6, 894.

33 Central Pacific R. R. Co.

The Commissioner of the General Land Office.

SIR: I have before me the appeal of the Central Pacific Railroad Company from your predecessor's decision of January 23, 1886, rejecting its claim to the S. E. $\frac{1}{4}$ sec. 33, T. 12 N., R. 7 E., M. D. M., Sacramento, California.

After a careful examination of the case, I see no reason for disturbing the said decision, and the same is accordingly hereby affirmed. See Malone *v.* Union Pac. R. R. Co., decided by this department July 9, 1888.

The papers transmitted with your letter of May 11, 1886, are herewith returned.

Very respectfully,
(Signed) WM. F. VILAS, *Secretary.*

Denies that in virtue of said act of Congress or in compliance therewith or at all the Central Pacific Railroad Company of California became vested as of the date of the passage of said act or at any time or at all with the title in fee or any title or claim to the southeast quarter of said section 33, or any portion of said quarter; denies that it has or ever had become entitled to have documentary evidence of its title by letters patent to it for said quarter section.

Denies that the Central Pacific Railroad Company has duly selected or selected at all the southeast quarter of said section.

34 On the contrary, defendant avers that the Central Pacific Railroad Company presented its list No. 25 for said quarter section for filing in the United States land office at Sacramento, and that the filing of the same was refused on the 14th day of January, 1889; that said company appealed from said decision on the 23rd day of February, 1889, and that the Commissioner of the General Land Office, by letter "F" of March 12, 1889, sustained the action of the said land office at Sacramento and refused to allow the said selection to be made or filed; that an appeal was taken from this decision to the Secretary of the Interior, but the said decisions refusing the said filing have never been reversed, revoked, or modified, and are still in full force and effect.

Denies that the issue of a patent to said company has been delayed or obstructed or prevented by said defendant; on the contrary, avers that in no event can said company receive a patent for the demanded premises or any portion thereof.

Denies that on the — day of August, 1888, or at any other time or at all the plaintiff, under mesne conveyances from the Central

Pacific Railroad Company or otherwise, was seised in fee or entitled to the possession of the southeast quarter of said section 33, t'p 12 N., R. 7 E., or any part thereof; denies that plaintiff at the time of the filing of the complaint or now or at any time was, is, or ever has been the owner of said premises or any part thereof or entitled to the possession thereof or any part thereof; denies upon information and belief that the plaintiff ever succeeded to any rights
35 or pretended rights in or to said premises or any part thereof from the Central Pacific Railroad Company by mesne conveyances or otherwise; denies that on the — day of August, 1888, or at any time mentioned in said complaint as the performance of an act by defendant, that plaintiff was in the actual possession of said premises or any part thereof; denies that he ever ousted said plaintiff from said land or any part thereof, but entered peaceably into the possession thereof as a settler under the homestead laws of the United States; denies that by the entry upon said land or the withholding possession thereof by defendant or by any other act mentioned in said complaint the plaintiff has been damaged in the sum of one thousand dollars or any other sum whatever; denies that the continued withholding of said premises from plaintiff will cause him damage in the sum of one hundred dollars or any other sum or amount whatever for each or every month that the same is withheld or at all; denies that the plaintiff has sustained or will sustain any damage of any kind or in any amount by defendant withholding said land from plaintiff.

Defendant admits that on the 28th day of August, 1888, he filed in the United States land office at Sacramento his application to enter said land as stated, but avers that he entered into the possession of said land and settled thereon peaceably and found no one in possession thereof or any part thereof; avers that he duly filed with the register and receiver of the United States land office at Sacramento his application in due and proper form to make final proof, and thereupon the register fixed the date on which the same should be heard in compliance with the laws of the United States and the rules and regulations
36 of the Land Department thereof, and he duly issued for publication and did duly publish the notice required by law, as required by law, in a newspaper published in Placer county for the time required by law; that on the date so fixed as aforesaid the defendant with his witnesses appeared and made the proof required by law and showed to the satisfaction of the register and receiver all the facts required by law, and thereupon he was allowed by said officers to make final entry by paying the purchase-money, to wit, the sum of four hundred dollars, which he duly paid, and the receiver then issued to him an official receipt showing said payment, and that he, said defendant, was the owner of the land sued for herein, and the register of said land office duly issued a certificate thereof and transmitted the same to the Commissioner of the General Land Office, at Washington, District of Columbia.

For a further and separate defense herein defendant avers that at the time of the commencement of this action and now another de-

partment of the Government of the United States had and has assumed jurisdiction over the land sued for herein and the whole thereof, and by proceedings duly had in said department, to wit, the Land Department, was engaged and is now engaged in hearing and determining the title to said land, and that the matters in issue in said department have not yet been finally determined.

37 For a further and separate defense herein defendant avers that by a judgment of the Department of the Interior, Land Department of the United States, duly given and made on the 23rd day of January, 1886, said department having jurisdiction, it was decided, determined, decreed, and adjudged that the land sued for herein and the whole thereof was public land subject to disposal as public land; avers that by a judgment duly given and made on the 17th day of July, 1888, the Secretary of the Interior of the United States duly affirmed said judgment, and that neither of said judgments has ever been reversed, modified, or set aside, but are now and were at the time of the commencement of this action in full force and effect.

For a further and separate defense herein, avers that the effect of this action is to harass — annoy a co-ordinate branch of this Government in the exercise of the functions conferred upon it by the laws of the United States and which it is now and at the time of the commencement of this action was engaged in exercising.

For a further and separate defense herein defendant avers that the Government of the United States has not parted with its title to the land sued for herein or any part thereof to the plaintiff or to any of his grantors or predecessors in interest, but that the legal title to the whole thereof is now in the United States, subject to the right of the defendant to obtain a patent therefor.

38 For a further and separate defense herein, avers that this court has no jurisdiction over the subject-matter of this action or this controversy; that both plaintiff and defendant derive their claim and title from the same source.

For a further and separate defense herein defendant avers that all his acts complained of in plaintiff's said complaint have been done in pursuance of the rulings and with the approval of the Land Department of the Department of the Interior of the United States.

For a further and separate defense herein defendant avers that the courts of the States of California have sole and exclusive jurisdiction over the parties to and the subject-matter of this action.

Wherefore defendant, having fully answered, prays that this action be dismissed; that he go hence without day, and that he be allowed his costs of suit.

ROB'T T. DEVLIN,
Attorney for Defendant.

STATE OF CALIFORNIA, } ss:
County of Sacramento, }

Frank C. Taylor, being by me first duly sworn, on oath deposes and says he is the defendant in the within-entitled action; that he

has read the foregoing and annexed answer and knows the
39 contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

FRANK C. TAYLOR.

Subscribed and sworn to before me this 10th day of May, 1890.
[SEAL.] WM. H. DEVLIN,
Notary Public.

Endorsed: Due service by copy of the within answer admitted this 13th day of May, 1890. A. P. Catlin, attorney for plaintiff. Filed May 15th, 1890. L. S. B. Sawyer, clerk.

40 *Stipulation Waiving Jury.*

In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

JOEL P. WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

Trial by jury is waived by the parties in above cause.

A. P. CATLIN,
Att'y for Plaintiff.
ROB'T T. DEVLIN,
Att'y for Defendant.

(Endorsed:) Filed August 15th, 1890. L. S. B. Sawyer, clerk.

41 *Findings.*

In the Circuit Court of the United States for the Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

The above cause having been tried by me, sitting as a circuit judge in the circuit and district aforesaid, without a jury, a jury having been expressly waived in writing by the stipulation of the respective parties, and after argument having been submitted for decision, I now make and file in writing the following findings of fact and conclusions of law:

Findings of Fact.

I. That the Central Pacific Railroad Company, one of the corporations mentioned in the act of Congress approved July 1, 1862,

after the passage of said act, did within six months duly file its assent to said act and within the said period duly filed a map designating the general route of its railroad as required by said act.

II. That the Secretary of the Interior of the United States on August 2, 1862, caused all the lands of the United States within fifteen miles of said designated route to be withdrawn from preemption, private entry, and sale.

III. That the line of said railroad from the commencement, as named in the said act of Congress, to a point fifty miles eastward thereof was prior to the ninth day of September, 1864, definitely
fixed, actually constructed, and in operation through and
42 beyond T. 12 N., R. 7 E., M. D. M., and was fully constructed, accepted, and in operation prior to the 10th day of July, 1868.

IV. That the premises the title to which is involved in this action consist of the S. E. quarter of sec. 33 of said township and are within five miles of said railroad as definitely fixed and constructed and within the limits of said withdrawal made in 1862.

V. That all the lands in said township had been duly surveyed by the United States, and on the 18th day of April, 1856, a return was duly made by the surveyor general for the State of California of an official plat of the survey of said township, which plat, showing the subdivision section lines, was, on the 18th day of April, 1856, filed in the General Land Office of the United States, at Washington, and a duplicate thereof filed during said year 1856 in the local land office of the district within which said land was situated.

VI. That by said survey and return of the surveyor general all the land in said township and including the premises in question was ascertained and returned as agricultural land, not mineral or swamp in character, and not covered by any Government reservation; that prior to the commencement of this action the Central Pacific Railroad Company had complied with all the necessary conditions and requirements imposed by statute and had requested the issue of a patent to them for the premises the subject of this action.

VII. That on the 28th day of May, 1857, one Henry H. Jones, having paid the fees required by law in such cases, filed his preemption declaratory statement in the United States land office at Marysville, the same having then jurisdiction over the demanded premises. The declaratory statement was in words and figures following:

43 "I, Henry H. Jones, of Placer county, being an American citizen over the age of twenty-one years and a single man, have, on the 16th day of January, 1854, settled and improved the southeast quarter section No. thirty-three (33), of township No. twelve north (12 N.), of range No. 7 east (7 E.), Mt. Diablo meridian, in the district of lands subject to sale at the land office at Marysville, California, containing one hundred and sixty acres, which land has not yet been offered at public sale and thus rendered subject to private entry, and I do hereby declare my intention to claim

the said tract of land as a pre-emption right under the provisions of an act of Congress of the 3rd day of March, 1853.

Witness my hand this 22nd day of May, 1857.

HENRY H. JONES.

In presence of—
V. E. REMINGTON."

This declaratory statement was indorsed "Henry H. Jones, Placer county. Dec. Filed 28 May, 1857. 16 Jan., 1854. S. E. ¼ sec. 33, 12 N., 7 E.," and was duly noted in the proper volume of tract books in the proper United States land office. This was the only pre-emption claim to the premises in question prior to the time when the line of the C. P. road was definitely fixed; that the said pre-emption claim of Jones was not filed until more than three months had elapsed after the filing in the respective land offices of the plats containing the official surveys of the quarter section in controversy.

VIII. This tract of land, with others, was proclaimed for sale by the President's proclamation of June 30, 1858, which provided for the opening of the sale on February 14th, 1859; that by said proclamation notice was given for all pre-emption claimants that their rights would be forfeited unless they, prior to February 14th, 1859, should establish the same and pay for lands they had given notice of their intention to pre-empt. There is no evidence that said Jones ever made any proof of his right to pre-empt nor that he paid
44 or offered to pay for said lands. The proclamation, however, declared that "no mineral lands or tracts containing mineral deposits are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal pursuant to the requirements of the act of Congress approved March 3rd, 1853." Pursuant to this direction the local officers withheld from offering and sale all of said section 33 as stated in their report dated March 13, 1859. After stating all the offerings and sales made in said township and range the report concludes: "All the balance of the township reserved, mineral lands." All of section 33 aforesaid was reserved and the tract in question remained in the category of unoffered lands and was not sold.

IX. Suit was commenced in the United States land office by the Central Pacific Railroad Company against H. H. Jones, and on the fourth day of December, 1885, the register and receiver of the local land office decided that his declaratory statement should be cancelled. In due time the record in this case was transmitted to the Commissioner of the General Land Office, at Washington, D. C., who on December 23d, 1886, affirmed the decision of the local officers and further held, "At the date when the route of the C. P. R. R. Co. was definitely fixed a pre-emption claim had attached thereto, that of Jones, and as the grant to said company expressly provided that lands to which a pre-emption claim had not attached were granted it follows that lands to which such a claim had then attached were not granted (K. P. R. R. Co. *v.* Dunnmeyer, 113 U. S., 629, and U. S. *v.* U. P. R. R. Co., 12 Copp, 161). That Jones' claim has been

found to have been abandoned or invalid cannot operate to the railroad company's advantage, for the granting act did not provide that lands to which an unabandoned or valid pre-emption claim may not have attached were granted, but only that lands to which a pre-emption claim may not have attached were granted. The claim of Jones had attached when the railroad was definitely
45 located, and, whether valid or invalid, excepted the land from the grant.

"The tract in question is therefore held to be subject to disposal as public land."

And the decision was affirmed by the Secretary of the Interior on July 17, 1888.

X. On the 28th day of August, 1888, the defendant made entry of the demanded premises under the homestead laws of the United States of America and paid all the fees and commissions required by law. Defendant's entry upon said land was peaceable. He afterwards duly filed with the register and receiver of the local land office his application to make final proof, and thereupon the register fixed the date on which the same should be heard, in compliance with the laws of the United States and the rules and regulations of the Land Department thereof, and gave the notice required by law. On the day fixed the defendant with his witnesses appeared and made the proof required by law, and showed to the satisfaction of the register and receiver all the facts required by law, and thereupon he was allowed by said officers to make final entry by paying the purchase-money, which he paid, and the receiver then issued to him an official receipt showing said payment and that defendant was the owner of the demanded land, and the register issued a certificate thereof and transmitted the same to the Commissioner of the General Land Office, at Washington, D. C.

XI. The Central Pacific Railroad Company presented its list No. 25 for said quarter section for filing in the United States land office at Sacramento, and the same was refused on the 14th day of January, 1889, and the Commissioner of the General Land Office affirmed the decision of the local office and refused the selection to be made or filed. An appeal was taken from this decision to the Secretary of the Interior, who also affirmed it and decided that the list could not be made nor selection made.

46 XII. That prior to the commencement of this action all the right, title, and interest which said Central Pacific Railroad Co. had at any time in said premises had been transferred and vested by mesne conveyances of quitclaim to and in the plaintiff, who was vested at the time of the commencement of the action with whatever right, title, and interest the said Central Pacific Railroad Company ever had in said premises.

XIII. That Jones, from the time that he alleged settlement, in 1854, up to about 1859, cut some hay off from about four acres of the land in controversy, which he had enclosed with a brush fence. Jones cut off the brush on the ground in controversy to enable him to make the fence. At that time the country was open and Jones pastured his cattle and sheep on the land in controversy, as well as

over the surrounding country, but he never settled upon the land in controversy. He lived on section 4 adjoining. At the time of Jones' settlement the lines of survey were not generally known. Jones subsequently left the country to visit England about 1859, the exact date not being fixed, and never returned. His record filing remained intact on the records of the land office until cancelled, as hereinbefore stated.

XIV. That the value of the subject-matter of this action at the date of the commencement thereof was more that five thousand dollars.

XV. That the reasonable rental value of said premises from and since the 28th day of August, 1888, is fifty dollars per month.

XVI. That the defendant entered upon the premises in question August 28th, 1888, and has ever since been in the possession thereof.

XVII. That the defendant is the son of Edward T. Taylor, who was the register of the United States land office at Sacramento, California, at the time that the application was made by the Central Pacific Railroad Company to disprove the claim of H. H. Jones,
47 but was not register at the time the application was made by the Central Pacific Railroad Company to select the land, on the 14th day of January, 1889, per list No. 25, nor at the time the defendant filed his homestead application.

As conclusions of law I find:

I. That the land in controversy at the date of the filing of the homestead entry of defendant was part of the public domain of the United States, subject to disposal as public land.

II. That at the time of the commencement of this action the Government of the United States had not parted with its title to the land in controversy or any part thereof, and that the plaintiff has no right, title, or interest in the same or any part thereof.

III. That the defendant has fully complied with all the provisions of the laws of the United States relative to the appropriation of lands under the homestead laws of the United States.

IV. That judgment should be entered in favor of defendant dismissing this action, and that he recover his costs.

Let a judgment be entered accordingly.

(Signed) HAWLEY, *Judge.*

Endorsed: Filed May 8, 1891. L. S. B. Sawyer, clerk.

48 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

JOEL PARKER WHITNEY
vs.
FRANK C. TAYLOR. } No. 10355.

This cause having come on regularly for trial on the 22nd day of October, 1890, being a day in the July, 1890, term of said court,

before the court, sitting without a jury, a trial jury having been theretofore duly waived by written stipulation of counsel for the respective parties hereto—A. P. Catlin and B. E. Valentine, Esqs., appearing on behalf of the plaintiff and Robert T. Devlin, Esq., appearing on behalf of the defendant—and the trial having been proceeded with on the 23rd day of October, in said year and term, and the evidence, oral and documentary, on behalf of the respective parties having been introduced and closed, and the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and the court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the finding aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendant go hereof without day, and
49 that said defendant recover of and from said plaintiff his costs in this behalf expended, taxed at $—.

Judgment entered May 9, 1891.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 9th day of May, A. D. 1891.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed May 9th, 1891. L. S. B. Sawyer, clerk.

50 *Clerk's Certificate.*

In the Circuit Court of the United States, Ninth Judicial Circuit in and for the Northern District of California.

JOEL PARKER WHITNEY
vs.
FRANK C. TAYLOR. } No. 10355.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers, hereto annexed, constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 9th day of May, 1891.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Judgment-roll. Filed May 9th, 1891. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

51 *Opinion.*

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

JOEL PARKER WHITNEY
vs.
FRANK C. TAYLOR. } No. 10355.

JANUARY 12, 1891.

A. P. Catlin and B. E. Valentine, for plaintiff.
Robert T. Devlin, for defendant.

HAWLEY, *J.:*

This is an action of ejectment. The cause was tried before the court without a jury. The plaintiff claims title under a deed from the Central P. R. R. Co. The land in question is situated in the odd-numbered sections which were granted to the railroad company by the act of Congress of July 1st, 1862 (12 U. S. Stat., 489). This land, under and by virtue of said act of Congress, became vested in the railroad company on the 26th day of March, 1864, when the map of the definite location of said railroad was filed in the proper department at Washington, unless it had been "sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached."

The testimony shows that one Jones filed a pre-emption declaratory statement on the land in question on the 28th day of May, 1857, in the proper land office, alleging settlement thereon in January, 1854, and this declaratory statement remained intact
52 and unacted upon until long after the date of the filing of the map of the definite location of the railroad, to wit, until 1885, when, it appearing in proceedings had before the Commissioner that Jones never lived on the land, his filing was canceled. The Commissioner of the Land Office, after Jones' declaratory statement had been cancelled, decided that "at the date when the route of the C. P. R. R. Co. was definitely fixed a pre-emption claim had attached thereto, that of Jones, and, as the grant to said company expressly provided that lands to which a pre-emption claim had not attached were granted, it follows that lands to which a claim had then attached was not granted." This decision was affirmed by the Secretary of the Interior. The defendant Taylor, subsequent to the decisions in the land office holding the land in question "to be opened for settlement by the first qualified person applying therefor," applied for said lands under a homestead entry, and after a contest in the land office with the C. P. R. R. Co. it was decided that he was entitled thereto.

The legal question presented in this case is whether, under the facts stated, a pre-emption claim had attached to the land within the meaning of the act of Congress. Plaintiff's counsel contends that a pre-emption claim, within the meaning of the statute, is a recognized

claim in favor of a qualified pre-emptor who has settled on the land and who, by compliance with the prerequisites of the act of Congress, is entitled to have his claim ripen into a perfect title. The application of Jones might have been cancelled prior to the time when the grant took effect if proper action had been taken to produce that result in the Land Department; but as his declaratory statement remained on file valid upon its face, a pre-emption had attached within the meaning of the act of Congress and the land did not pass to the railroad company.

53 The failure of Jones to comply with the pre-emption laws did not cause the land to revert to the railroad company, and it did not by reason of any failure of his to comply with the law become a part of the grant, but upon the cancellation of his statement the land was open for settlement. This conclusion is sustained by the Land Department and upheld by the decisions of the Supreme Court of the United States in Leavenworth, etc., R. R. Co. *vs.* U. S., 92 U. S., 734; Newhall *vs.* Sanger, 92 U. S., 761; Kansas P. R. R. Co. *vs.* Dunmeyer, 113 U. S., 629; Hastings and Dakota R'y Co. *vs.* Whitney, 132 U. S., 357, and by the supreme court of Nebraska in B. & M. R. R. Co. *vs.* Abink, 14 Neb., 95.

It is true that in several of these cases there was either a valid homestead claim initiated by settlement followed by an entry or a pre-emption claim initiated by settlement followed by a declaration of intention to purchase, but the decisions are based upon the fact of the filing of the declaratory statements in the proper land office. The cases all proceed upon the theory that when this claim is filed the right of the applicant becomes "attached to the land." The word "claim" as used in the act was not intended to be restricted to such homestead and pre-emption claims as should afterwards ripen into perfect title, but was intended to include all claims that were made in such form as to be recognized and allowed by the land office without any regard to the question whether they were valid at the time of filing or whether they were afterwards perfected, abandoned, canceled, or forfeited. In Kansas Pacific R'y Co. *vs.* Dunmeyer, *supra*, the court in distinguishing the case from W. & M. Co. *vs.* Bugbey, 96 U. S., 165, said: "In the case before us a claim was made and filed in the land office and there recognized before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of

54 Congress this homestead claim had attached to the land and it therefore did not pass by the grant. Of all the words in the English language this word attached was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as

much as if in a deed it had been excluded from the conveyance by metes and bounds."

In Hastings, etc., R. R. Co. *vs.* Whitney, *supra*, the court, in answer to the contention of counsel for plaintiff that the Dunmeyer case had no application, because in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in the case then under consideration "was invalid on its face and in its inception," said: "We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public land. When these three requisites are complied with and the certificate of entry is executed and delivered to him, the entry is made, the land is entered. If either one of these integral parts of an entry is defective—that is, if the affidavit be insufficient in its showing, or if the application in itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers and a certificate of entry is
55 delivered to the applicant and the entry is made of record, such entry may be afterwards canceled on account of these defects by the commissioners or on appeal by the Secretary of the Interior, but these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain and therefore precludes it from subsequent grants." After quoting from Newhall *vs.* Sanger, where the general principle applicable to all these cases was clearly announced, and referring to the rulings of the Land Department in harmony therewith, the court said: "For the foregoing reasons we concur with the court below, the Turner's homestead entry excepted the land from the operation of the railroad grant, and that upon a cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the Government and became a part of the public domain, subject to appropriation by the first legal applicant."

The views I have expressed are conclusive of the case and render it unnecessary to discuss at any length other questions raised at the trial with reference to Jones' failure to file his claim within three months after the filing of the township plats of survey, as required by the act of Congress of March 3rd, 1853 (10 U. S. Stat., 246), or his failure to make final proof and payment for the land prior to the 14th day of February, 1858, the day appointed by the President for the commencement of the public sale including said lands. These are questions that could only be raised when the validity of Jones' claim came up regularly for a hearing in the land office. As was said by the court in Kansas Pac. R. R. Co. *vs.* Dunmeyer, 113 U. S., 641, and repeated in Hastings and Dakota R. R. Co. *vs.* Whit-
56 ney, 132 U. S., 364, "It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants, on the one hand, and the railway company, on the other)

as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation this great corporation, with an interest to defeat their claim and to come between them and the Government as to the performance of their obligations."

Let judgment be entered in favor of defendant and for his costs.

(Signed) HAWLEY, *Judge.*

Endorsed: Read in open court January 12th, 1891. L. S. B. Sawyer, clerk.

57 *Plaintiff's Exceptions.*

United States Circuit Court, Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant. } Plaintiff's Exceptions.

The plaintiff hereby separately and specifically excepts to each refusal of the court to find the several respective conclusions of law requested by the plaintiff.

And said plaintiff also separately and specifically excepts to each of the conclusions of law found by the court upon the trial of the above-entitled cause, and in particular he excepts—

I. In that the court has found that the land in controversy at the date of the filing of defendant's homestead entry was part of the public domain of the United States.

Whereas the court should have found that prior to the filing by defendant of his homestead entry said land had been segregated from the public domain and that title thereto had vested in the plaintiff's grantor on the 1st day of July, 1862.

II. In that the court has found that at the time of the commencement of this action the Government of the United States had not parted with its title to the land in controversy and that the plaintiff has no right, title, nor interest in the same or any part thereof.

Whereas the court should have found upon the facts as proved that the Government of the United States parted with its title to the land in controversy to the plaintiff's grantors on the 1st day of July, 1862.

58 III. In that the court has found that judgment should be entered in favor of the defendant dismissing the action with costs.

Whereas the court should have found that judgment should be entered for the plaintiff for the possession of the premises and for his costs and damages.

H. D. TALCOTT,
Attorney for Plaintiff.

Endorsed: Filed May 9th, 1891. L. S. B. Sawyer, clerk.

59 *Bond.*

In the Supreme Court of the United States.

JOEL PARKER WHITNEY, Plaintiff in Error,
vs.
FRANK C. TAYLOR, Defendant in Error.

Know all men by these presents that we, F. L. Whitney and Wm. Fairgrieve, are held and firmly bound unto Frank C. Taylor, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said Frank C. Taylor, his heirs or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1891.

Whereas the above-named Joel Parker Whitney has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment entered by the circuit court of the United States for the northern district of California in the cause entitled Joel Parker Whitney *vs.* Frank C. Taylor, No. 10355:

Now, therefore, the condition of this obligation is such that if the above-named Joel Parker Whitney, plaintiff in error, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

60 F. L. WHITNEY.
WM. FAIRGRIEVE.

Signed, sealed, and delivered in the presence of—
E. B. RYAN.

UNITED STATES OF AMERICA,
Northern District of California, } *ss:*

F. L. Whitney and Wm. Fairgrieve, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars in lawful money of the United States, exclusive of property exempt from execution and over and above all debts and liabilities.

F. L. WHITNEY.
WM. FAIRGRIEVE.

Subscribed and sworn to before me this 30th day of June, 1891.

E. B. RYAN,
[SEAL.] *Notary Public.*

The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed June 30th, 1891. L. S. B. Sawyer, clerk U. S. cir. court, nor. dist. Cal.

61 *Stipulation as to Demurrer, &c.*

Circuit Court of the United States for the Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant.

It is hereby stipulated that the records of the circuit court show that the demurrer to the original complaint was by an order of the court sustained and the plaintiff allowed 20 days in which to prepare and file the amended complaint, which he did in due and proper time.

ROB'T T. DEVLIN,
Attorney for Defendant.

Endorsed: Filed August 7th, 1891. L. S. B. Sawyer, clerk.

62 United States Circuit Court, Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant. } No. 10355.

Service of copy of the annexed statement of case in the cause above entitled is admitted this 3rd day of August, A. D. 1891.

ROB'T T. DEVLIN,
Attorney for Defendant.

63 *Statement of Case and Bill of Exceptions.*

United States Circuit Court, Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant. } No. 10355.

Statement of case.

This action was brought in ejectment by the filing of a complaint on the first day of May, 1889. A demurrer interposed to this complaint was sustained. An amended complaint was filed on the fifth day of November, 1889, to which a demurrer was interposed by the defendant for the reasons stated therein. After the argument upon the demurrer the same was overruled and the defendants filed *their* answer to the amended complaint.

The issues came on for trial at a stated term of the court held on the 22nd day of October, 1890, before Hon. Thomas P. Hawley,

sitting as circuit judge, a jury having been waived by the parties by a written stipulation filed with the clerk of the court.

Mr. B. E. Valentine opened the case for the plaintiff and put in evidence documentary proofs and stipulations establishing a compliance by the Central Pacific Railroad Company with the requirements of the act of Congress of July 1, 1862, as alleged in the complaint and found by the court in its findings of fact; and, among other matters, it was in open court conceded by the defendant "that in the year 1856 all the lands in the township in controversy were surveyed and a due return of the official plat of township survey was filed in the General Land Office at Washington and in the local land office of the district within which the lands in
64 controversy are situated, and that by said survey and the said plat the description of all the lands of said township were ascertained and the character thereof determined to be agricultural land, not mineral or swamp in character, nor covered by any Government reservation."

Said counsel for the plaintiff also put in evidence the findings of the Commissioner of the General Land Office referred to in the answer of the defendant, and read therefrom as follows:

"A hearing was had in this case on September 21st, 1885, and upon the testimony adduced thereat you decided in effect that H. H. Jones never lived upon the land, and that his filing should be cancelled." * * *

"Independent of said hearing and decision Jones' filing is subject to cancellation, as is also that of Henry A. Davis, hereinbefore referred to, both filings having expired by limitation."

Whereupon it was stated by Mr. Devlin, counsel for defendant, in open court as follows: "We admit that the Land Department had decided there was not a settlement upon the land sufficient to comply with the requirements of the land laws."

P. W. BUTLER, sworn as a witness for the plaintiff, testified, among other matters, that for ten years he had resided on land adjoining the land in controversy, and that during that period of time it had been under his observation and had been in the possession of one Evan Phelan, who had used the same for pasturage and a small portion thereof for cultivation, and that the whole section was fenced prior to the witness's acquaintance with the same.

That he, as agent for the plaintiff, made the purchase of said quarter section from Mr. Phelan and paid him in cash the sum of $3,200; that thereafter the plaintiff entered into occupation of the land and commenced to clear the same, and expended
65 upon it prior to the entry of defendant the sum of twenty-five hundred dollars ($2,500) for clearing of the land, and also several hundred dollars for cutting the wood and putting the land in condition to plant with fruit trees; that he knew the defendant, Frank C. Taylor, and met him on the day he took possession of the land, on which occasion the latter came there with several men with Winchester rifles and stated "he had filed on the land as Government lands and proposed to stay there;" that wit-

ness demanded possession in behalf of the plaintiff and informed the defendant that if he failed to remove from the land the matter would have to be adjusted by the courts.

JAMES G. WHITNEY, sworn as a witness for the plaintiff, testified as to the character and value of the land and its rental value.

EDWARD F. TAYLOR, sworn as witness for the plaintiff, testified—

That he was the register whose decision as an officer of the Sacramento land office is set forth in the answer of defendant, and that defendant, Frank C. Taylor, is his son, but he was not register at the time homestead application of defendant was filed nor at the time the Central Pacific Railroad Company presented its list for filing. He also testified that he was familiar with the practice prevailing in the local land office with respect to pre-emption filings; that there was no particular form required by the practice of the office in a pre-emption declaratory statement.

That, as matter of practice, whatever is sent to the local land office is filed if it contains the allegations or statements that are requisite; that prior to the 19th of August, 1890, no affidavit was required to accompany any declaratory statement; that the filing of one declaratory statement or pre-emption filing did not prevent the filing of additional ones on the same tract of land, and that,
66 as matter of fact, it was the custom and practice to file as many pre-emption statements as presented and to note on the tract book as against the same piece of land as many filings as parties saw fit to send into the office. He also testified that a homestead entry when once made and allowed by the local land office, as matter of practice, could not be cancelled in the local land office, but by the General Land Office only.

Mr. Devlin, counsel for the defendant, then put in evidence duly certified copies of the documents and decisions set forth in his answer, and also proved that the defendant had taken all the steps required by the rules and regulations of the Land Department for a homestead entry of the tract in question in August, 1888; that he had made his final proofs and paid the sum of $400 for the land in question and received the receipt of the local land officers for the same upon a commutation of his homestead entry under section 2301 of the Revised Statutes.

In reply plaintiff's counsel put in evidence the order made by the circuit court overruling the demurrer to the amended complaint, and also read the deposition of EVAN PHELAN, who testified, among other things, that Henry H. Jones lived between the dates of 1853 and 1859 upon sections of land adjoining the tract in controversy; that in 1854 he lived upon the north*north*east quarter of section 4 of the adjoining township; that he disappeared from the neighborhood about the year 1859, saying that he was "going back to the old country."

On cross-examination the witness testified: I do not know how long Jones was in the country before I got acquainted with him. During the years 1853, 1854, and 1855 I did not see the land in con-

troversy very often. I was off prospecting, and cannot tell how often I did see it. I did not know at that time where the lines of survey were. Jones in those days lived on section 4, township 11, right adjoining the quarter section in controversy. Part of
67 the way there was a kind of a fence between this land and the land on which Jones lived, but it did not run exactly on the land. I did not know at that time where the dividing line was between sections 4 and 33. I do not think that anybody else knew. In 1856 I got acquainted with the lines. In 1856 or 1857—it may have been a little later—a little of the land in controversy was fenced in and Jones cut hay on the land on a few little flats. During the years 1856, 1857, and 1858 Jones used and occupied that little field he had there, and he cut a little hay off it. In the year 1857 he fenced in that little field.

That is my remembrance. There might have been four acres used. All the improvements that he put on were on that little field. There was a brush fence, taking in about four acres, that he put on. He got the brush that he made the fence with on the ground. It grew there. Jones cut some of it off the land in suit. I was there when he was doing it. I could not tell how long it took Jones to build the fence, because I was not there all the time. During the year 1857 Jones did not cut hay nor use any portion of this quarter section for pasturage any more than the rest of us. He never cut any more hay. In 1857 Jones had a few head of cattle, and he pastured these cattle on this quarter section of section 33, on the little field, and the country was open, and when he turned them out his cattle ran with the other cattle through the open country and over this quarter section. Jones pretended to farm a little and had a few head of cattle. He mined some. He raised a few vegetables, he and Phillips together, on section 4. In the year 1858 Jones made about the same use of this land that he did in 1857. In the year 1859 I do not remember much what use he made of it. I went away for about six months. Jones could have slept on this quarter section a great many times without me knowing it.

The deposition of A. MILLER was read in evidence. He testi-
68 fied that he was present when the defendant entered upon the land; that his entry was peaceful and quiet. He opened the gate. There was no one there at the time.

Plaintiff's counsel then put in evidence a duly certified copy of a presidential proclamation issued June 30th, 1858, and read therefrom as follows:

"No. 614.

"By the President of the United States.

"In pursuance of law I, James Buchanan, President of the United States of America, do hereby declare and make known that public sales will be held at the under-mentioned land offices, in the State of California, at the periods hereinafter designated, to wit: * * *

"At the land office of Marysville, commencing on Monday, the

14th day of February next, for the disposal of the public lands situated in the following townships and parts of townships, viz: North of the base line and east of the Mount Diablo meridian, * * * townships 11 and 12 (including the section in question).

"Lands appropriated by law for the use of schools, military and other purposes, or those covered by confirmed private land claims, together with the swamp or overflowed lands, will be excluded from the sale." * * *

"No mineral lands or tracts containing mineral deposits are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal pursuant to the requirements of the act of Congress of March 3, 1853.

"The offering of the above land will be commenced on the days appointed and proceed in the order in which they are advertised until the whole shall have been offered and the sales thus closed, but no sale shall be kept open longer than two weeks and no private entry of any of the lands will be admitted until after
69 the expiration of two weeks.

"Given under my hand at the city of Washington this 30th day of June, A. D. 1858.

"JAMES BUCHANAN, *President.*
"JOSEPH S. WILSON,
"*Acting Commissioner of the General Land Office.*"

Notice to Pre-emption Claimants.

Every person entitled to the right of pre-emption to any of the lands within the townships and parts of townships above enumerated is required to establish the same to the satisfaction of the register and receiver of the proper land office and make payment therefor as soon as practicable after seeing this notice and before the day appointed for the commencement of the public sale of the lands embracing the tract claimed; otherwise such claim will be forfeited.

JOSEPH S. WILSON,
Acting Commissioner of the General Land Office.

At the instance of the defendant, who requested an opportunity to introduce the report of the register of the local land office showing a withdrawal of the land in question from sale, it is stipulated and agreed that the following facts appear in said report, to wit:

"That the sale under said proclamation commenced at Marysville on the 14th day of February, 1859, and continued from day to day until the 26th day of February.

"That such lands as were offered were sold in their order as advertised, but none of the lands in township 12 north, range 7 east, were reached in said order or offered for sale until the fourth day of the sale.

"That in said township the lands in two sections only were offered for sale, viz., in sections four and five, and that the balance of the lands advertised in that township were withdrawn from sale

by the local land office because they were supposed to be valuable for mineral."

"It was agreed at the trial in respect to these said lands that when the lands in question were reached in their order at
70 this sale by the local land officers the latter withdrew said lands from the sale. The reason for so doing was that they supposed they were mineral lands, but as matter of fact they were not.

"This action on the part of the local land office was taken during the progress of the sale, and was based only on the sworn statement of persons who attended the sales."

The case was thereupon submitted to the court upon argument of counsel, and, after due consideration, the written decision and opinion of the court was filed together with his findings of fact and conclusions of law, as set forth in the record.

The plaintiff duly and specifically excepted to the several conclusions of law found by the court, and also duly and specifically excepted to the refusal of the court to make each and every one of the findings of fact and conclusions of law proposed by the plaintiff, which the court refused to find.

The court ordered judgment to pass for the defendant dismissing the plaintiff's complaint with costs, and the plaintiff thereupon in open court prayed an appeal to the Supreme Court of the United States, which was duly allowed.

The foregoing is settled by the court as a statement of the case and proceedings upon the trial of the above-entitled action, and for the purposes of appeal from the judgment the same is also allowed, signed, and sealed as a "bill of exceptions."

(Signed) HAWLEY, *Judge.*

Dated the first day of August, 1891.

71 Endorsed: You will please take notice that the within is a statement of the case in the above-entitled case to be used on a motion for a new trial or for the purposes of appeal from judgment therein. Yours, &c., H. D. Talcott, attorney for plaintiff, #408 California street, S. F., San Francisco, Cal. Filed August 7th, 1891. L. S. B. Sawyer, clerk.

72 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Northern District of California.

JOEL PARKER WHITNEY, Plaintiff,
vs.
FRANK C. TAYLOR, Defendant. } No. 10355.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing seventy-one written and printed pages, numbered from 1 to 71, inclusive, are a full, true,

and correct copy of the record and all proceedings in the therein and above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness my hand and the seal of said circuit court this 17th day of August, A. D. 1891.

L. S. B. SAWYER, *Clerk.*

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, northern district, of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joel Parker Whitney, plaintiff and plaintiff in error, and Frank C. Taylor, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff and plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 28th day of August next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. of Cal.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

74 [Endorsed:] R. No. 10355. United States Supreme Court. J. P. Whitney *vs.* F. C. Taylor. Writ of error. Filed June 30, 1891. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

The Answer of the Judges of the Circuit Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

75 UNITED STATES OF AMERICA, *ss:*

To Frank C. Taylor, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 28th day of August, A. D. 1891, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, wherein Joel Parker Whitney is plaintiff and plaintiff in error and you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of the ninth judicial circuit, this 30th day of June, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

76 [Endorsed:] R. No. 10355. In the Supreme Court of the United States. Joel P. Whitney, pl'ff and pl'ff in error, *vs.* Frank C. Taylor, def't and def't in error. Citation. Filed June 30, 1891. L. S. B. Sawyer, clerk U. S. cir. court, nor. dist. Cal.

77 UNITED STATES OF AMERICA, *ss:*

To Frank C. Taylor, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 28th day of August, A. D. 1891, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, wherein Joel Parker Whitney is plaintiff and plaintiff in error and you are defendant and defendant in error, to show cause, if any there be,

why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of the ninth judicial circuit, this 30th day of June, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

(Signed) LORENZO SAWYER,
United States Circuit Judge, Ninth Judicial Circuit.

78 [Endorsed:] R. No. 10355. In the Supreme Court of the United States. Joel P. Whitney, pl'ff and pl'ff in error, *vs.* Frank C. Taylor, def't and def't in error. Citation. Filed July 14, 1891. L. S. B. Sawyer, clerk. Service of a copy of within citation admitted June 30, A. D. 1891. Rob't T. Devlin, att'y for def't.

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IN THE

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OCTOBER TERM, 1894.

No. 278

JOEL PARKER WHITNEY,
Plaintiff in Error

vs.

FRANK C. TAYLOR,
Defendant in Error

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERRO

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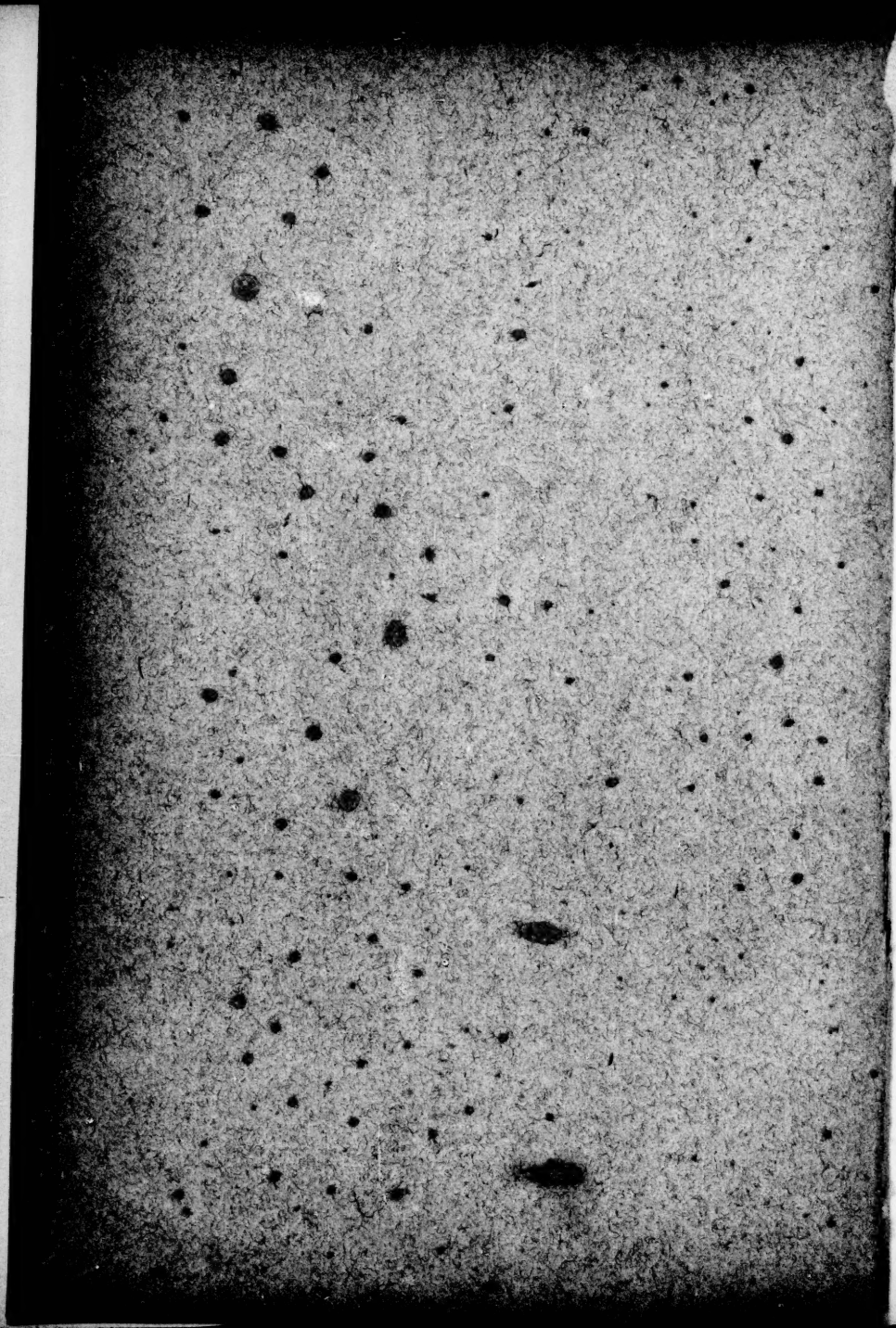

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This action was one of ejectment. The plaintiff purchased the property in suit from one Phelan, who had been in possession of the land, cultivating and improving it for more than ten years, as a grantee of the Central Pacific Railroad Company (fol. 65).

The defendant is the son of a former Register of the U. S. Land Office in the district where the land is situated, and who, taking advantage of a supposed defect of title in the railroad which was suggested in the proceedings had in said local land office (fol. 32) after plaintiff's purchase, took forcible possession of the land (fol. 65), and filed a homestead claim upon the same in the year 1888.

There was practically no dispute as to the facts, and no conflict of evidence upon the trial of the case. It was conceded and decided that the land in dispute had become vested in the railroad company and passed to the plaintiff, unless it was excepted out of the railroad grant by reason of a pre-emption or homestead claim attaching thereto at the date the grant acquired precision—to wit, 1864 (Decision of Court below, fol. 51).

The defendant relied upon the facts which were conceded by plaintiff and appeared upon the face of his amended complaint (fol. 17) that in 1857 one Jones had filed a declaratory statement (in the land office having jurisdiction of the premises) of intention to purchase the same under the pre-emption laws; although such claim was decided to be invalid and void from the beginning, because said Jones had never settled or lived upon the land (fol. 18).

The plaintiff's original complaint (fol. 1) did not set out the facts with sufficient detail to show that a question arising under the Federal Statutes was involved. A demurrer to it on that ground, to wit, "jurisdictional facts," was sustained (fol. 13). The complaint was then amended by setting forth all the facts involved in the original attempt to pre-empt the land by one Jones and the later attempt of the defendant to file a homestead claim on it (fols. 14–20).

The defendant demurred to the amended complaint, because, as he alleged, these facts appearing on the face of the complaint showed that a pre-emption claim had attached to the land, and that, therefore, it was excepted out of the railroad grant (Demurrer IV., V., fol. 23).

The whole question which appeared in the case at the final hearing below was once argued upon the hearing of this demurrer before the Hon. LORENZO SAWYER, Circuit Judge, who decided that the pre-emption declaration of Jones, set forth on the face of the plaintiff's amended complaint, was not a claim attaching to the land, and gave judgment for the plaintiff, overruling

said demurrer (fol. 24) and allowing defendant to answer.

The defendant thereupon answered the complaint, making the usual formal denial of any information or belief of the material allegations of the plaintiff's complaint (Answer, fols. 25-27); and setting up, with somewhat greater detail, the matters already appearing on the face of the plaintiff's complaint as to Jones' declaratory statement in 1857, and the defendant's own homestead application made in 1888.

This answer necessitated taking of formal proofs on the part of the plaintiff, to sustain the material allegations of the complaint.

The case on final hearing was tried before the District Judge of Nevada (sitting temporarily as a Circuit Judge in the California District), who, in spite of the action of the Circuit Judge in overruling the demurrer of the defendant, which presented the precise point involved in the final hearing, practically reversed the Circuit Judge and sustained the point made by the defendant, that the filing of Jones' void declaratory statement in 1857 excepted the land out of the grant made to the railroad company in 1864, and gave judgment for the defendant.

The plaintiff appeals to this Court.

POINTS.

The following points made by the plaintiff were sustained by the Court below and are not in question here, to wit:

1. That the Court had jurisdiction of the controversy.

As the decision of the case depends upon the construction to be given to Section 3 of the Act of Con-

gress of July 1, 1862, it is a case within Section 1 of Chapter 373 of the Act of March 3, 1887, giving to the United States Circuit Courts jurisdiction to entertain "all suits of a civil nature at law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the value of $2,000, arising under the laws of the United States."

Kansas Pacific R. R. Co. vs. A., T. & S. F. R. Co., 112 U. S., 416.

2. That the Act of Congress of July 1st, 1862, is a grant *in presenti* vesting a legal as well as an equitable title in the railroad company, and divesting the United States of title from the date of the act.

Denny vs. Dodson, 32 Fed. Rep., 899 (903).

The issue of patent to the railroad company is not necessary to enable it or its grantees to maintain ejectment for any of the granted lands.

Id., p. 904, and cases cited.

3. That the Land Department of the United States, after the vesting of title by Act of Congress, is without any jurisdiction, to allow entries or to entertain any proceedings in favor of other parties or to issue patents to any one but the railroad company for those lands.

An instrument purporting to be a patent to any person claiming other than under the paramount title is a nullity.

Wright vs. Rosebury, 121 U. S., 488 (519).

4. That the action of the Land Department in issuing a patent for such lands is simply a ministerial duty in confirmation of the title which vested by the Act of

Congress. It has no such judicial powers in respect to those lands as it possesses in respect to public lands subject to private entry.

Denny vs. Dodson, 32 Fed. Rep., 899 (p. 904).

The Acts of Congress

to be construed in this case are as follows:

Chap. CXX., July 1st., 1862. [12 Stat., 489.]

(The Railroad Land Grant.)

Sec. 3. *And be it further enacted*, that there be, and is hereby granted to the said Company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and *to which a pre-emption* or homestead *claim may not have attached at the time* the line of said road is *definitely fixed.*

Chap. CXLV., March 3, 1853. [10 Stat., p. 246.]

(Special Pre-emption Law for California.]

Sec. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or *unsurveyed*, with the exception of Sections 16 and 36, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this Act, or reserved by competent authority, and excepting also the lands claimed under the foreign

grant or title, and the mineral lands, shall be *subject to the pre-emption laws of the 4th of September, 1841*, with all the exceptions, *conditions* and limitations therein, except as otherwise herein provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale after six months' public notice in the State of the time and place of sale, under laws, rules and regulations now governing such sales, or such as may be hereafter prescribed: PROVIDED, *That, where unsurveyed lands are claimed by pre-emption, the usual notice* of such claim shall be *filed within three months after the return of the plat of surveys to the land offices,* and proof and payment shall be made prior *to the day appointed* by the President's proclamation for the commencement of the sale, including such lands; the entry of such claims to be made by legal subdivisions, according to the United States' survey, and in the most compact form. * * * Provided, That nothing in this Act shall be construed to authorize any settlement to be made upon any public lands not surveyed, unless the same be made within one year from the passage of this Act; *nor shall any right of such settlers be recognized* by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day.

Chap. XVI., Act of Sept. 4th, 1841 [5 Stat. 453].

(GENERAL PRE-EMPTION LAW.)

SEC. 15. *And be it further enacted*, That whenever any person *has settled* or *shall settle and improve a tract of land*, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last *within thirty days next after the date of such settlement*, file, with the register of the proper district, a written statement, describing the land settled upon, and declaring the intention of such person to

claim the same under the provisions of this act; and shall, where such settlement is already made, *within twelve months* after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and *if he or she shall fail to file such written statement* as aforesaid, or shall *fail to make such affidavit, proof and payment within the twelve months aforesaid*, the tract of land so settled and improved shall be *subject to the entry of any other purchaser.*

Chronological Statement.

The following dates become important in the examination of this case:

General homestead and pre-emption Act, applying to land *surveyed* and subject to private entry, enacted	Sept. 4, 1841
Special Act for California, allowing during one year settlement on *unsurveyed* lands, enacted	Mar. 3, 1853
Date of Jones' *pretended* settlement (fol. 43)	Jan. 16, 1854
Plats of survey of land in question filed in land offices (fol. 42, fol. 64)	April 18, 1856
The three months time for Jones to file declaratory statement under Act of 1853 (even if he had made a *bona fide* settlement) expired July 18th, 1856. No calculation of time could extend it beyond	Mar. 31st, 1857
Time when declaratory statement was filed by Jones (fol. 28, fol. 51 Finding VII., fol. 42.)	May 28, 1857
Presidential proclamation for sale of the lands published (fol. 68 Finding VIII., fol. 42.)	June 30, 1857

Day appointed for commencement of sale of said lands (fol. 68) (Finding VIII.)	Feb. 14, 1858
Date when all pre-emption claim of Jones (even if he had settled and filed as required by law) *expired*	Feb. 14, 1858
Date of grant to R. R. Co. (fol. 41)	July 1, 1862
Date of definite location of road, cutting off all further claims (fol. 51)	Mar. 26, 1864
Register and Receiver declare R. R. Co. entitled to land	Dec. 4, 1885
Deed from Railroad Co. to Plaintiff	August, 1886
Attempted homestead entry by Defendant	Aug. 28, 1888

The Error Complained of

consists in holding that a void declaratory statement made in 1857 by one not qualified to pre-empt and who never settled on this land and who permitted his claims to expire, by force of the statute, in 1858 without entry, should be given the same effect as an entry of the land and held to be "a claim still attaching to the land" in 1864 when the railroad line was definitely fixed.

The error of the Court below is based on its failure to distinguish between a "pre-emption statement" and an "entry."

Pre-emption Statement.

The former is merely a declaration under the act of September 4th, 1841, that a settler *intends to purchase*, and to be of any effect whatever as to the unsurveyed land in California it had to be filed within three months after the surveys of the land were filed (Act of Mch. 3, 1853).

A pre-emption statement is an unverified, unproved paper (fol. 28, fol. 66). It never segregated the land

from the public domain. It did not prevent the filing of similar statements by others in reference to the same land, and as many persons as saw fit could simultaneously file such statements as to the same land. There was nothing judicial in the act, and the land officers would receive them without limit (fol. 66).

The pre-emption claimant had *no interest* in the land. His filed statements did not prevent Congress from making any other disposition of it they saw fit.

Yosemite Case, 15 Wall., 87.

If such a statement on its face complied with the law and was made by a person *who had settled the land*, it became a claim "capable of ripening into a perfect title" and in such a case the land was, in the language of the statute, land to which "a pre-emption claim *attached*."

And even if valid in its inception, unless followed by an "entry" or the other steps prescribed by the statutes to be done within three months or a year, it became forfeit and *void on the face of the records* by force of the statutes.

Entry.

An "entry," on the other hand, is a judicial act.

The word, as used in connection with public lands, does not mean (as at common law) the physical act of "entering upon" the land. Nor does it mean the clerical act of entering a record in a book. It means the acquiring of an *interest*, and involves the *payment* of a purchase price.

Eldred vs. Sexton, 19 Wall., 189.

It is a *decision* by the tribunal having exclusive jurisdiction of the subject matter that the applicant is entitled to the land. It segregates the land for the time being from the public domain so that it is no longer public land.

No matter how irregular the *application* is which precedes the "entry," and no matter how lacking the qualifications of the entry man, the "entry," when once adjudicated by the local land officers, estops inquiry and concludes every one; except the Government, upon a direct proceeding to cancel the entry.

Even the local land officers cannot cancel the entry (fol. 66).

As said by this Court in Hastings vs. Whitney, "So long as it remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

123 U. S. (364).

If, in the present case, Jones (even though he had not settled the land; and even though his pre-emption statement was irregular on its face) had been permitted to *enter* the land, his claim would have "attached." The land would have been no longer part of the public domain, the adjudication involved in the "entry" would have estopped inquiry on the part of the railroad company or any tribunals, but there was neither settlement as a foundation for a pre-emption claim, nor an entry to estop inquiry on that subject, and on the face of the records the claim was a nullity, as will hereafter appear.

The Court below correctly quoted this Court in its definition of what the word "attached" means in connection with a claim—to wit: "Not mere settlement, "residence or cultivation of the land, but a proceeding "in the proper land office by which the inchoate right "to the land was initiated * * * *which could ripen* "*into a perfect title.*"

K. P. Ry. Co. vs. Dunmeyer, 113 U. S., 629 (644).

But the Court below erred in its application of that

decision. It assumed that Jones' claim "could ripen into a perfect title," whereas the contrary conclusively appeared.

No "entry" having been allowed to Jones it was competent at all times and places to inquire whether the claim ever was, on its face, one which could ripen into a title, or whether Jones was a settler on the land.

If it appeared that under no possible conditions could that old claim ripen into a title, either, because it was not filed in accordance with law in the first instance, or because there had never been a settlement on which to base it, clearly there was no claim which ever "attached to the land," irrespective of whether it was still attaching at the time of the railroad grant.

There might be a "paper attached to the land-office files," but nothing more.

The Court below erred in its conception of the law, when it said of the Jones claim :

"The *application* of Jones might have been *canceled* prior to the time when the grant took effect, if proper action had been taken to produce that result in the Land Department; but as his declaratory statement remained on file, *valid upon its face*, a pre-emption had attached within the meaning of the Act of Congress."

The Court evidently proceeded on the theory that Jones had *entered* the land. "Entries" are "canceled." "Statements" under the pre-emption act need not be "canceled." If such statements do not contain the jurisdictional allegations they are mere worthless and void writings. If the land subsequently becomes the subject of a Government proclamation of sale the pre-emption claim becomes *forfeit* on the first day set for the sale, by virtue of the act which authorized it in the first place (fol. 69).

Jones' claim did not attach to the land.

1. His claim was never *prima facie* valid on the face of the records when originally filed.

Assuming he was qualified to pre-empt by virtue of his having settled the land, he was, under the provisions of Sec. 15 of the special Act of 1853, obliged to file his declaratory statement *within three months* after the filing of the plats of survey in the Land Offices.

The surveys were filed in 1856 (fols. 42, 64).

This Court has decided that a pre-emption statement filed without authority of law is a *nullity*.

And that, if not filed within the time prescribed by law, it is "in every sense an unofficial document not belonging to the office."

Lansdale vs. Daniels, 100 U. S., 113 (116).

It appears on the face of the records that Jones did not file his claim until May, 1857, several months *after the time to file it had expired* (fol. 43, Finding VII.). It was an unauthorized act. It bore on its face the proof of its invalidity. It was not even a *prima facie* claim, for on the face of the records of the Land Office it was an unauthorized proceeding. It did not *attach*, even on the face of the records.

2. His claim, even if valid when filed, was not on its face valid after February 14th, 1858.

Had the claim of Jones been duly filed by an actual settler, within the three months limited by law—so as to be valid when filed in 1857, yet, inasmuch as he did not comply with the statute of 1853 which obliged him to make final proofs and pay for the land prior to the 14th day of February, 1858 (the day appointed by the President for the commencement of the public sale including said land), his claim, even on the face of the records, would have ceased to exist. It was forfeited and would no longer *attach* to the land.

The proclamation record is in evidence (fol. 69),

and at the end of it is a notice to all pre-emption claimants which terminated all *claims* on their part on February 14, 1858. It will be observed that the language of the statute is not that the land must be paid for by the pre-emptor "prior to the day when such land is put up for sale," but "prior to the day *appointed* for the commencement of the sale, which includes their lands"—irrespective of when the lands are reached for sale, or whether they are offered or withdrawn.

There are certain other statutes which on their face might seem to have extended the time for a pre-emptor under the general acts, but, if examined, it will be seen that these supposed enabling statutes refer only to "Colorado lands" and to cases "where no other time is fixed" as limit for final payment.

3. If the claim of Jones filed May, 1857, could under no circumstances have ever ripened into a title because of his own disqualifications, then it could not be in any sense a claim *attaching* to the land at the date the line of road was definitely fixed.

It is proved conclusively that Jones *never settled* the land (fol. 31, Finding XIII.; fol. 46). His pretended settlement was never even *prima facie* adjudged to exist by any action of the Land Department, nor by anything in the nature of a judicial act such as the allowance of an entry.

That Congress intended this *settlement* by the pre-emption claimant should be the foundation of, and essential to, the *attaching* of any claim on his part to the land is apparent from the fact that the General Act of 1841, which first allowed pre-emption of surveyed lands (see Section 15 of Act of 1841), as well as the Special Act of 1853, relating to unsurveyed lands, permit a pre-emption only by a person who, prior to 1841, *has settled*, or who, after 1841, *shall settle and improve*.

The special limited privileges conferred by the Act of 1853 are subject to "all the exceptions, conditions and limitations" of the Act of 1841, so that Jones,

claiming the right to pre-empt unsurveyed land under the Act of 1853, but never having *settled* on the land, had no standing under either act, and had no *claim* which *could* possibly "ripen into a title." This so-called "claim" was, therefore, a mere void declaration. It was in no sense a "claim," nor did it nor could it ever "attach" to the land.

K. P. R. R. Co. vs. Dunmeyer, 113 U. S., 629.

The Reductio ad Absurdum.

If the decision of the court below is sound, that the mere existence of a paper writing on the records of a land office, irrespective of any validity in its inception, constitutes a claim *attaching to the land*, and continuing to attach for all time until it is *adjudged void* by some tribunal, the whole land grant could have been defeated by any shrewd speculator, who might; just before each township plat of survey was returned by the Surveyor-General, file in the land offices seventy-two printed notices, pretending to claim in favor of seventy-two fictitious persons all the respective quarters of the 18 odd numbered sections in said township.

A construction of the statute which would permit such a result is neither within the letter nor the spirit of the act. The excepting clause was designed to be used, not as a sword, but only as a shield to protect the claims, of *settlers*, which had at least a *prima facie* valid *inception*.

The cases cited by Court below do not sustain its decision.

It is only when an *inchoate right* to the land has been initiated which is capable of *ripening into a perfect title* that it can be said to be a claim attaching to the land. In a homestead case the claim is initiated by

settlement followed by an entry. In a pre-emption case it is initiated by a *settlement* followed by a statutory declaration of intention to purchase. In neither case can it ripen into a title without *settlement*, although the judicial allowance of an homstead "*entry*" by the Land Office is conclusive evidence that there had been settlement, and that all the proceedings have been regular.

Bearing in mind the principle involved, it will be seen that all the cases cited by the Court below in support of its decision, are distinguishable from the present case, in that in every one of them there had been either *actual settlement* or an "entry" at the date the railroad grant acquired precision.

In K. P. R. R. Co. vs. Dunmeyer (113 U. S., 629), a valid homestead entry was made, which was a judicial determination that Miller had settled the land.

In Hastings and Dakota R. R. Co. vs. Whitney (132 U. S., 357), there had also been a judicial determination, by the allowance of an "entry," that Turner *had settled* the land.

In B. & M. R. R. Co. vs. Abink (14 Nebraska, 95), the only pre-emption case cited, the Court found that Doyle, the original pre-emption claimant, *had actually settled and improved the land*, and sold his improvements by mesne conveyance to the defendant Abink. They say (p. 98): "It is enough that he *had made a settlement* upon the land, and in *due time filed* in the proper land office his declaratory statement of his intention to pre-empt it."

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[illegible] and pre-emption cases, cited by the Court below to justify its decision, it will appear from the statement of facts in the respective cases that there had been an "*entry*." This not only conclusively proved settlement, but it also "severed the land from the other public lands." The true rule and the reason for it is clearly stated by Mr. Justice FIELD in Bardon vs. N. P. R. R. Co., 145 U. S., 535, where the effect of a pre-emption upon a subsequent railroad grant was considered. He says (p.

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son—the payment of the sums due to the Government having been made, as the law allowed, by them after his death—*took the land* from the operation of the subsequent grant to the Northern Pacific Railroad Company."

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Bearing in mind the principle involved, it will be seen that all the cases cited by the Court below in support of its decision, are distinguishable from the present case, in that in every one of them there had been either *actual settlement* or an "entry" at the date the railroad grant acquired precision.

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In the other cases cited by the Court below (Leavenworth R. R. Co. vs. U. S., 92 U. S., 734, and Newhall vs. Sanger, 92 U. S., 761), the land had been *segregated from the public domain* and was *sub judice* at the time of the railroad grant.

In every one of the homestead and pre-emption cases, cited by the Court below to justify its decision, it will appear from the statement of facts in the respective cases that there had been an "*entry*." This not only conclusively proved settlement, but it also "severed the land from the other public lands." The true rule and the reason for it is clearly stated by Mr. Justice FIELD in Bardon vs. N. P. R. R. Co., 145 U. S., 535, where the effect of a pre-emption upon a subsequent railroad grant was considered. He says (p.

Jones' claim was never prima facie valid, even on its face, when filed.

His declaration (in which he pretends to have settled the land in 1854) was not dated nor filed until May, 1857 (Finding VII., fol. 43). This was more than three months after the filing of the plats of surveys (Finding VII., fol. 43) and of *no validity* under Sec. 6 of the Act of 1853.

It was of no validity even on the face of the records after February, 1858, because the land had been proclaimed by the President for sale, and all pre-emption claims on it, even though previously valid, were forfeited (fol. 69).

The decisions of other Judges, on the point involved, sustain this appellant.

Judge SAWYER, the Circuit Judge, in this very case, in overruling (fol. 24) the defendant's demurrer (fol. 23) reached a different conclusion from the District Judge, who tried the case at final hearing.

The Court in Northern Pac. R. R. Co. vs. Meadows, sustains fully the position taken by the plaintiff on this appeal.

46 Fed. Rep., 255.

U. S. v. U. P. Ry. Co., 61 " " 143 (148).

The Proceedings in the Land Department Subsequent to 1864.

The decisions of the Secretary of the Interior in proceedings of the railroad company for a patent to the lands, or on proceedings of the defendant to homestead the lands can have no effect on the rights of this plaintiff.

If the land vested in the railroad company by the Act of July 1st, 1862, it passed to this plaintiff by the deeds made in August, 1886, and the Land Department was a tribunal without any jurisdiction to entertain proceedings or make decisions which could affect the plaintiff's rights. Even if the Department had followed up its decision by the actual issue of a patent to Taylor, neither the conclusions of law of the Secretary nor the patent itself would have any effect to bind this plaintiff.

This Court in *Wright vs. Roseberry* say, " The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity." * * * If the lands " never were public property, or had been previously disposed of, * * * *the Department will have no jurisdiction to transfer them*, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would, in that event, be like that of any other special tribunal *not having jurisdiction of a case which it had assumed to decide.*"

Wright vs. Roseberry, 121 U. S., 519.

The decision of the Interior Department upon *matters of law* are never binding on the Courts.

H. & D. R. R. Co. vs. Whitney, 132 U. S., p. 366.

The folly of claiming for such decisions any binding effect will be apparent from an inspection of a decision by Teller, Secretary of the Interior, precisely

the reverse of the decision of Secretary Villas, now urged by defendants.

See Orr vs. C. P. R. R., 2 Land Decisions of the Interior Department (p. 525).

The judgment should be reversed and judgment ordered for plaintiff on the facts found or a new trial ordered.

B. E. VALENTINE,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United St

OCTOBER TERM, 1894.

JOEL PARKER WHITNEY,
Plaintiff in Error,
vs.
FRANK C. TAYLOR,
Defendant.
} No. 278.

BRIEF FOR DEFENDANT.

C. W. HOLCOMB,
W. J. JOHNSTON,
Attys. for Def

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vs.
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Defendant.

No. 278.
October Term, 1894.

Brief for Defendant.

This case comes up from the Circuit Court of the United States for the Northern District of California.

The decision of that court is reported in 45 Federal Reporter, 616.

The transcript of record gives the full detail of facts and proceedings, but the following statement presents all that we deem essential to the argument and understanding of the case.

The property involved is the southeast quarter of section 33, in township 12 north, range 7 east, Mount Diablo base and meridian, in the State of California.

Plaintiff in error (also plaintiff below) claims title as purchaser through mesne conveyances from the Central Pacific Railroad Company, a corporation existing under the laws of the State of California.

He also claims that said railroad company acquired title by virtue of an Act of Congress, entitled "An Act to aid in the construction of a railroad and telegraph line from the

Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862 (12 Stat., 489).

Said Act created the certain parties therein named into a corporation under the name of "The Union Pacific Railroad Company." Section 3 of said Act was as follows:

"That there be, and is hereby, granted to the said company for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the opertaion of this Act," &c.

By section 9 of said Act the Central Pacific Railroad Company aforesaid was authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento River, to the eastern boundary of California, "upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California."

The lands were withdrawn on general route in 1862, and map of definite location was filed in the Interior Department March 26, 1864, definitely fixing the line opposite to and beyond the land in question, at which last-named date the right of the road attached. (Van Wyck *vs.* Knevals, 106 U. S., 360.)

The land had been theretofore surveyed, the plat of survey having been filed in the district land office in the year 1856.

This is an action in ejectment, and it is essential to the recovery by plaintiff that he establish his title. He cannot rely upon any weakness in that of his adversary.

If his grantor, the said railroad company, had no title, then it could convey none to him, and his action fails.

It is conceded that the right of the railroad company attached to said land and that title passed to it, unless the tract fell within the exceptions to the grant named in section 3 of the granting Act quoted above.

Defendant contends that the tract was excepted from the grant by virtue of the fact that a pre-emption claim had attached to it at the time the line of the road was definitely fixed, and relies upon the record of the pre-emption claim of Henry H. Jones to establish said essential fact.

The following is the declaratory statement of said Jones:

"I, Henry H. Jones, of Placer county, being an American citizen over the age of twenty-one years and a single man, have, on the 16th day of January, 1854, settled and improved the southeast quarter section No. thirty-three (33) of township No. twelve north (12 N.), of range No. 7 east (7 E.), Mt. Diablo meridian, in the district of lands subject to sale at the land office at Marysville, California, containing one hundred and sixty acres, which land has not yet been offered at public sale and thus rendered subject to private entry, and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of an Act of Congress of the 3d day of March, 1853.

"Witness my hand this 22d day of May, 1857.

"HENRY H. JONES.

"In presence of
"V. E. REMINGTON."

Said declaratory statement was indorsed, "Henry H. Jones, Placer county, Dec. Filed 28 May, 1857, 16 Jan., 1854, S. E.

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Said declaratory statement was indorsed, "Henry H. Jones, Placer county, Dec. Filed 28 May, 1857, 16 Jan., 1854, S. E.

¼ sec. 33, 12 N., 7 E.," and was duly noted in the proper volume of tract books in the proper United States Land Office.

No question has ever been made that Jones was a qualified pre-emptor under the law.

The gist of plaintiff's contention in respect of said filing is that said Jones did not reside upon, or cultivate or improve, or make a settlement in person on the tract in controversy, nor make entry or payment therefor, and that therefore no pre-emption claim had attached to the land at date of definite location as aforesaid.

There is also the contention that the land was proclaimed for sale by the President, and that Jones' failure to make proof and payment prior to the day of sale forfeited his right, and he had no claim thereafter.

Said tract of land, with others, was proclaimed for sale by the President's proclamation of June 30, 1858, which provided for the opening of the sale on February 14, 1859, and notice was therein given for all pre-emption claimants that their claims would be forfeited unless proven and paid for prior to February 14, 1859.

There is no evidence that said Jones made such proof and payment. The proclamation, however, declared that "no mineral lands or tracts containing mineral deposits are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal pursuant to the requirements of the Act of Congress approved March 3, 1853.

Pursuant to said direction the local land officers withheld from offering and sale all of section 33, Tp. 12 N., R. 7 E. (embracing the tract in controversy), treating it as reserved mineral lands, as it was then supposed to be; so that by the express terms of the President's proclamation this tract was excepted out of the offering, and was, consequently, not sub-

ject to the condition which worked forfeiture upon failure to make proof and payment prior to the day of sale. It could not be expressly excepted from the offering and at the same time be subject to it and its incidents. In the history of the public lands no tract has ever been classed as having been "offered," which was authoritatively excepted from an actual offering at public sale. In this, as in all other like cases, the Land Department has always treated the tract in question as unoffered land. Nor can it make the slighest difference that it was subsequently found that this land was *not* mineral, for at the day set for public sale the officers of the Government necessarily acted upon the evidence and information then before them, and for the purposes of that proceeding their action was by authority and conclusive.

The said railroad company, in 1885, by proceedings in the Land Department sought the cancellation of Jones' declaratory statement and a decision which would declare the land to belong to the company by virtue of said grant of July 1, 1862.

The decisions of the Commissioner of the General Land Office and of the Secretary of the Interior are found on pages 17 to 19, inclusive, of transcript of record in this case.

The district land officers decided in effect that Jones *never lived* on the land; and the Commissioner held that independent of that fact the filing had expired by limitation, and concluded it. He held, however, that the pre-emption claim of Jones had attached when the road was definitely located, and, whether valid or invalid, excepted the land from the grant, and that the tract was subject to disposal as public land. The Secretary of the Interior affirmed that decision under date of July 17, 1888.

The month next following, to wit, on August 28, 1888, Frank C. Taylor, defendant in the case at bar, made home-

stead for the said tract, and commuted the same to cash entry July 1, 1889.

On January 14, 1889, said company filed list of selections No. 25 for this land alone. It was rejected by the district land officers on the authority of the decisions of the Commissioner and Secretary as aforesaid, and was likewise rejected by the Commissioner, which decisions were affirmed by the Secretary of the Interior August 19, 1890 (11 Land Decisions, 195).

In that decision it was declared that the land was properly excepted from the offering at public sale because of the reservation as mineral lands; that the tract remained in the category of *unoffered* lands; that the Jones declaratory statement did not expire by limitation until July 14, 1872, and was of record and *prima facie* valid at the time when the company's rights attached, and excepted the tract from the operation of the grant. The Secretary affirmed the decisions below, rejecting the application of the company to select this land.

This was the holding of the Secretary of the Interior in respect of a filing of record *prima facie* valid when made, and unexpired at date when the rights of the roads attached in case of Malone *v.* U. P. R'y Co., 7 Land Decisions, 13; Millican *v.* N. P. R. R. Co., 7 Land Decisions, 85; Sioux City & P. R. R. Co. *v.* Lewis, 8 Land Decisions, 292; N. P. R. R. Co. *v.* Gjuve, 8 Land Decisions, 380; Payne *v.* A. & P. R. R. Co., 7 Land Decisions, 405; U. P. R. R. Co. *v.* Haines, 9 Land Decisions, 595; N. P. R. R. Co. *v.* Stovenour, 10 Land Decisions, 645; and such has been the holding of the Land Department to the present time, so that it has long been a rule of property, and the right to large areas of land has been determined thereby, and the decision of this Court to-day that said holding was not the law would affect a multitude of settler owners and their transferees.

Referring to plaintiff's contention that Jones never made settlement, cultivation, or improvement on this tract, we ask attention to finding of fact XIII by the Court below (p. 25, transcript), which is as follows:

"XIII. That Jones, from the time he alleged settlement, in 1854, up to about 1859, cut some hay off from about four acres of the land in controversy, which he had inclosed with a brush fence. Jones cut off the brush on the ground in controversy to enable him to make the fence. At that time the country was open and Jones pastured his cattle and sheep on the land in controversy as well as over the surrounding country, but he never settled upon the land in controversy. He lived on section 4, adjoining. At the time of Jones' settlement the lines of survey were not generally known. Jones subsequently left the country to visit England about 1859, the exact date not being fixed, and never returned. His record filing remained intact on the records of the land office until cancelled, as hereinbefore stated."

The facts thus found show that Jones *did* make settlement and improvement on said tract, and long prior to his declaratory statement, which was filed May 28, 1857, and both settlement and declaratory statement were prior to the Act of July 1, 1862, by which the grant was made, as well as prior to the definite location of the line of road in 1864, whereas the declaratory statement did not expire until July 14, 1872, or long subsequent to the date the line of definite location was fixed, and that pre-emption claim had, therefore, attached at the date the route was definitely fixed, in the language of section 3 of the granting Act.

The court below, and, in fact, attorneys on both sides, seemed to regard said acts upon and occupation of this land as not constituting *settlement*. In this there was an apparently uniform misapprehension, and to set this right for convenient reference we will, as briefly as possible, show what *settlement* is.

The following is the opinion of Attorney-General Mason, dated 1846 (IV Opinions of Att'y-Generals, 493).

"ATTORNEY-GENERAL'S OFFICE,
"*April* 25, 1846.

"SIR: I have examined the question presented in the report of the Commissioner of the General Land Office of the 25th of March, ultimo, arising on the conflicting claims of Abraham Brauley and Andrew Mullasky and Charles Maddy, the former under the pre-emption law of 4th September, 1841, and the two last by entries at private sale to a portion of the public lands mentioned.

"The question is, from what point of time is the period of thirty days to be computed within which a person intending to exercise the right of pre-emption is to give written notice? The Commissioner has decided that the count commences from the date of the settlers entering on the lands and cutting timber to make the improvement required by law; the claimant, Brauley, contends that it ought not to commence until he had made it his abiding place by sleeping on the premises.

"The tenth section of the Act of 4th September, 1841, gives the right of pre-emption on such of the public lands as are liable to entry at private sale, subject to certain conditions.

"These conditions are specified in that and the subsequent sections of the law; but reference to the 12th and 15th only will be made in consideration of this question. A settlement must be made and notice of an intention to purchase the lands as a pre-emptor must be given within thirty days from date of such settlement. The settler must inhabit and improve the same, and must erect a dwelling thereon, to entitle him to the privilege, and to perfect his title he is allowed twelve months from the date of such settlement to exhibit proof that he has complied with the conditions, and to make payment. Settling, inhabiting, and improving, are all used as circumstances to be performed and proved; but they are not used as synonymous in their meaning.

"The object of the law is beneficent, and it is entitled to a liberal construction in aid of the ends to be attained.

But, to accomplish this, such a construction must be given as will protect the settler in his ultimate right—first, for thirty days from the date of this settlement; and, secondly, for twelve months from the same time. The settler is entitled to this protection against the claims or entries of others. From the moment, therefore, that he enters in person on land open to such a claim, with *animus manendi*, or rather with the intention of availing himself of the provisions of the act referred to, and does any act in execution of that intention, he is a settler. He must afterwards give his notice of intention, inhabit, improve, build his house, and make his proof and payment within the time stipulated to perfect his right. But in every stage he is protected until he fails on his part to comply with the conditions of the law.

"In this case the Commissioner of the General Land Office appears to me to have decided correctly; that the date of Brauley's entering on the lands and cutting logs to build his house, with the purpose of purchasing as a pre-emptor, is the true date from which to commence the commutation; and as he failed to give his notice within thirty days, and to make payment and proof within twelve months from that date, he is not entitled to preference over those who had entered the same lands at the land office.

"I have the honor to be, sir, your obedient servant,

"J. Y. MASON.

"Hon. ROBT. J. WALKER,
"*Secretary of the Treasury.*"

In the case passed upon by the Attorney-General the act of entering upon the land to cut logs was the settlement act, and the date thereof was the date of settlement, and he was concluded because he did not complete the final acts before the expiration of the time given by the statute, reckoning from that date.

We refer to said opinion because it has been applied from that time to this in the Land Department.

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In Bowman *v.* Davis (12 Land Decisions, 415), the only question was, whether Bowman made a *bona fide* settlement

prior to the entry of Davis? The Secretary of the Interior said:

"The acts of settlement on the part of Bowman are substantially stated in your office opinion, and consist in piling up a few stones in the vicinity of the cellar; another pile (variously estimated from twelve to fifty, and from the size of a man's fist to that of a bushel basket) at the well, and three small piles on a knoll near the northern boundary of of the iand."

* * * * * * * *

"Upon these facts the register and receiver held that Bowman had not performed an act of settlement sufficient to hold the land as against the entry of Davis, in which findings you concur.

"I am of the opinion that your judgment is not sustained by the decisions of this department, the weight of authority being that 'an act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home and performs some act indicative of such intent.' (Franklin *v.* March, 10 L. D., 582.)

"The definition of a settler does not, in my judgment, require that such act should necessarily be done in connection with his residence on the land, such as commencing the erection of a house to reside in; but it may be any visible act tending to disclose a design to appropriate the land under and in accordance with the pre-emption laws."

In the same case the Secretary referred to Etnier *v.* Zook, 11 Land Decisions, 452, where the act of settlement which gave priority consisted in surveying the land and "throwing up sod mounds on the boundaries of her claim."

Many like decisions could be cited.

Now, applying the definition of settlement given by Attorney-General Mason, *supra*, in 1846, and which has continued to be authoritative in the Land Department to the present time, to the admitted acts of said H. H. Jones on the tract in controversy, and we have the settlement acts

which have always been held sufficient as the basis for a declaratory statement, and hence the declaratory statement of Jones *was valid*.

Also, the settlement on a portion of a quarter section will sustain a claim to the entire quarter, according to the survey. Jones, by his subsequent declaratory statement, distinctly alleged that his claim was the quarter section in controversy, so that there can be no mistake as to what his claim was.

"But a settlement upon a portion of a quarter section, and making the improvements required by law, will sustain a pre-emption claim to the whole quarter section as against parties subsequently settling upon them." (Quinby *v.* Conlan, 104 U. S., 420.)

This is the rule of the Land Department. (Walton *v.* Batten *et al.*, 14 L. D., 54.

This was a *claim*.

"When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to CLAIM the same under the pre-emption laws," &c. (U. S. Revised Statutes, sec. 2264.)

"Every *claimant* under the pre-emption law for land not yet proclaimed for sale is required to make known his *claim* in writing to the register of the proper land office within three months from the time of settlement, giving the designation of the tract and the time of settlement, otherwise his *claim* shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land who has given such notice and otherwise complied with the law." (U. S. Rev. Stats., sec. 2265.)

"All *claimants* of pre-emption rights under the two preceding sections (2265 and 2266) shall, when no shorter time

is prescribed by law, make the proper proof and payment for the land CLAIMED within thirty months after," &c., &c. (R. S., 2267.)

So it appears that the exception of pre-emption *claims* in section 3 of the granting Act aforesaid used the word *claims* not only in its common signification, but in the sense authorized by the use of the word in the pre-emption statutes. The clear meaning was tracts of land *claimed* under the pre-emption law. The age, status, or degree of advancement of the claim towards maturity is obviously immaterial.

Settlement, under the pre-emption law, is the first act contemplated by law. After settlement comes the declaratory statement by which the *claim is made of record.*

The cutting of brush and building of fence inclosing about four acres on this land by Jones and the use of same constituted *settlement*, and that settlement was the legal basis for his declaratory statement which was the legal notice of a pre-emption claim.

It is seen that the statutes quoted above refer in terms to the settler's right, status, and intention as constituting a *claim*, and the filing of the declaratory statement is the prescribed act by which the claim is made of record.

Jones having made settlement in person, and having filed his declaratory statement setting out his claim, a pre-emption claim had attached to the land at date the line of the road was definitely fixed, and the company was defeated.

From the foregoing it will appear that, as aforesaid, the court and attorneys below failed to give to the admitted acts of Jones their legal significance, for they *did* constitute *settlement.* Inhabitancy, &c., are other separate and subsequent duties, not essential to the *claim*, but only to ultimate title.

Now this court gives credit to the *facts* as found by the Land Department.

In the decision of January 23, 1886 (pp. 17 *et seq.* transcript), the finding of the district land officers is stated as being in effect that Jones "never *lived* on the land."

Living upon a tract and *settling* upon it are two different things. One may *settle* in good faith, and file his claim of record as the law requires and yet be prevented by circumstances thereafter arising from inhabitation.

So in the decision of the Secretary upon the application of the C. P. R. R. Co. to select the tract at bar (11 Land Decisions, 195), the Secretary referred to the case, decision of which is on page 17, transcript, as follows:

"On September 12, 1885, the company offered testimony before the local officers *to show* that Jones had *never actually made settlement* on the tract, and those officers *decided* that he had *never lived* on the land."

Neither the Secretary nor any officer below him in the Land Department ever decided that Jones never made *settlement;* the acts found by the court below constitute *settlement*, and we direct attention to the point only that if this Court should find that settlement was essential to the attaching of a pre-emption claim, as contemplated in section 3 aforesaid of the granting Act, it might conveniently appear, with the authorities therefor, that Jones did make such settlement as the Land Department has always and uniformly held sufficient as the initial Act, authorizing the filing of a declaratory statement, making the claim of record, and which, if subsequently followed up by compliance with the further requirements of the statute, defeated all subsequently instituted adverse claims and authorized patent which would relate back to the date of the initiatory act and cut off all intervening claimants. (Shepley *v.* Cowan, 1 Otto, 330.)

Not only were the acts of Jones on this tract sufficient as settlement acts, but he filed his claim of record, distinctly

and intelligently declaring that this tract was his claim and that he had settled upon it, thus appropriating those settlement acts.

Why he did not remove his house to it from over the line which separated it from this tract is not shown. Evidently his house was built before that line of survey was run.

It is not alleged that he ever filed for any other tract, and he filed so long after survey that there is no ground to suspect any mistake of description.

The fact that he filed subsequent to the expiration of three months from date of filing of township plat of survey in the district land office is immaterial, as there was no adverse settler. (Johnson *v.* Towsley, 13 Wallace, 72.)

The settlement of Jones was alleged in said filing as of January 16, 1854, or while the land was unsurveyed.

The third proviso in section 6 of said Act of March 3, 1853, authorized settlement on unsurveyed lands within one year from the passage of said Act.

The Act of March 1, 1854, entitled "An Act for the extension of the pre-emption privilege to the State of California," (10 Stat., 268) further extended that privilege of settlement on unsurveyed lands for two years after its passage.

Jones' settlement was alleged to have been made while said right of settlement on unsurveyed lands existed. His declaratory statement of record, as aforesaid, had, therefore, all the requisites of a valid filing, and constituted a claim of record *prima facie* valid.

The requirement in said section 6 of the Act of March 3, 1853, that proof and payment on pre-emption claims on unoffered lands should be made prior to the day set by the President for the commencement of the sale, including such lands, was not changed until July 14, 1870, when, by Act of that date (16 Stat., 279), proof and payment were required

within eighteen months after the three months given for filing had expired, or within twenty-one months after settlement, and where said period had elapsed at date of the Act, one year from its passage was also given.

This gave to the declaratory statement of Jones a lifetime, ending July 14, 1871.

By joint resolution of March 3, 1871 (16 Stat., 601), the time was still further extended twelve months, making the time for proof and payment on such lands thirty-three months from settlement, or survey when settlement was made on unsurveyed lands (see U. S. Revised Statutes, Secs. 2265, 2266 and 2267).

This shows that said declaratory statement of Jones, made in 1857, or long prior to the granting Act to the Central Pacific Railroad Company, was in full force and effect *as a living claim of record* until several years subsequent to the definite location of the line of said road opposite the land herein involved; the definite location being, as aforesaid, March 26, 1864, and the expiration of the lifetime of said filing being July 14, 1872, and at any time prior to said last-named date, on proof of inhabitancy, etc., the entry of Jones would have been permitted, and patent would have issued to him.

As the grant to said company was only of lands, among other exceptions, "to which a pre-emption or homestead claim may not have attached *at the time* the line of said road is definitely fixed" (sec. 3, Act of July 1, 1862, *supra*), and as the tract in question was one to which said pre-emption claim had attached *prior* to the time and "*at* the time," and continued to be attached and of record long subsequent to the time said line of road was definitely fixed, it would seem very clear that said tract was excepted from the grant, and that title never passed to said company under whom plaintiff claims.

Against this conclusion there is but a single conceivable ground for further contention, and that is that the pre-emption claim named in the granting Act was intended to be what is called a *valid* or *lawful* claim.

This would involve the importation of a word into the statute; "but treaties, like statutes, must rest on the words used, 'nothing adding thereto, nothing diminishing.' In Rex *v.* Barrell (12 Ad. & Ell., 468) Patterson, Justice, said: 'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.' And the court have always treated the subject the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them." (Leavenworth, &c., R. R. Co. *v.* United States, 92 U. S., 733.)

In Newhall *v.* Sanger (92 U. S., 761) the court said:

"This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed, but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication."

The case of Kansas Pacific Railway Company *v.* Dunmeyer (113 U. S., 629) involved the construction of the grant made by Act of July 1, 1862 (12 Stat., 489), the very statute to be construed in this case, and under which plaintiff makes contention as aforesaid.

That decision is comprehensive and construes the statute involved. It decides that legislation subsequent to July 1, 1862, did not repeal the 3d section of the Act of that date, in which the grant and its exceptions are defined.

It also most clearly and unmistakably decides that the *record claim* in the district land office, or in the General

Land Office, was determinate of the fact that a pre-emption or homestead claim had attached. The Court on this point said:

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections, they were not granted. The express and unequivocal language of the statute is, that the odd sections *not* in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not to these."

As the plats in the land office show nothing but the notation of a pre-emption or homestead claim, the Court necessarily held that record alone to be sufficient to determine that the land covered by it was not granted to the railroad.

After saying that no attempt had ever been made to include in the grant lands reserved to the United States, and which reservations afterwards ceased to exist, and that in no case where lands had been otherwise disposed of had their reversion to the Government brought them within the grant, the Court said:

"Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land?

* * * * * * * *

"It is not conceivable that Congress intended to place these parties as contestants for the land with the right in

each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation this great corporation, with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations."

* * * * * * * *

"In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. This claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the Act of Congress, this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

"Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Said case decided three things:

1. That the exceptions to the grant found in section 3, Act of July 1, 1862, were not repealed by subsequent legislation.

2. That a *claim of record*, pre-emption or homestead, defeated the company, and that the fact of a claim being of record was evidenced even by the plats of the land office; that the statute did not mean a compliance with the pre-emption or homestead laws, but that a *right* had fastened to the land which by future residence and cultivation could

ripen into a perfect title, and that this could be determined by the official record.

3. That with the performance of the conditions essential to secure title under the pre-emption or homestead law the company had nothing to do. In other words, it had no standing in law which entitled it to be heard upon that matter, *because* the record in the land office showing that a claim had attached prior to the definite location of the route of the road was determinate of the question, and excepted the land from the grant, and Congress did not intend to permit the company to contest such settler claimants.

It would seem that said case is an exact and controlling precedent for that at bar. It related to the same grant, the same exception, and the same question of abandonment and non-performance of all the conditions essential to secure final entry and patent to the settler claimant, and to the cancellation of the homestead claim which covered the tract involved at date of the definite location of the railroad; and it told the company that whenever a pre-emption or homestead claim was of record in the land office the tract covered by it was excepted from the grant to the company, and that compliance or non-compliance with the pre-emption or homestead laws did not enter into the question.

This is reasserted in Hastings and Dakota Railway Co. *v.* Whitney, 132 U. S., 357, wherein the holding in the Dunmeyer case, *supra*, that "It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railway company on the other) as contestants, with the right in each to require proof from the other of complete performance of its obligation," &c., is quoted and emphasized, and the apparently unavoidable couclusion from both decisions is that they intended to hold, and did hold, that a pre-emption or homestead claim *of record* in the proper land office at date of the definite location of the

company's line of road excepted the land covered by that *record claim*, and that so certainly was this the intention of Congress that it was "*not conceivable*" that it intended to place those parties—pre-emption and homestead claimants and the company—as contestants, with a right to put in issue a question of compliance with law.

If we understand said decision aright, they make an end of this case, and the decision below must be affirmed.

Our attention has been called to case of the United States *v.* Union Pacific Railway Company, decided by the circuit court, Kansas district, April 9, 1894, and reported in 61 Federal Reporter, page 143.

In that case the same grant and condition were brought in question as in the case at bar.

The court found a declaratory statement of record filed by one Charles Elder prior to the date of definite location of the road opposite to the land involved. It also found that said Elder had not made a previous settlement, and held that a pre-emption attached by reason of settlement, and not by the filing of a declaratory statement; that the settlement segregates the tract from the public lands of the United States, and the inchoate right is initiated by that act. The court also referred to the language of the decision in the Dunmeyer case, *supra*, as *obiter* so far as it related to pre-emptions, and undertook to show from some concluding language of the decision that it was quite clear that the court intended its observations to apply only to homestead entries, which at that time were initiated only by entry in the land office and not by settlement.

We do not deem it necessary to discuss said decision elaborately, because:

1st. The said decisions of this court are so clear and conclusive upon the point.

2d. If the matter were to be argued on principle it would

be found that a pre-emption declaratory statement, made of record in the district land office, attached a *claim* to the land by precisely the method prescribed by the pre-emption statute, and if Congress did not intend (as said decisions very distinctly declare it did not) to permit said railroad company to contest settlers' claims, the record must necessarily control, and certainly could not be impeached except for fraud, which has not been alleged in this case.

The declaratory statement is a written statement describing the land, giving date of settlement, and declaring the intention to claim the tract under the pre-emption law. (R. S., 2264.)

"Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement," &c. (R. S., 2265.)

This was what was filed in the case at bar by Jones. It made his claim of record and was notice of his claim to the world, for it was the notice expressly provided by statute. The *claim* had thus attached, and the explicit language of the Dunmeyer case does not permit the point to be followed further.

3d. As we have hereinbefore shown, there were in the case at bar settlement acts on the tract in controversy by Jones prior to his making his pre-emption claim of record, such as the land department has always held sufficient as the act of settlement and a proper basis for a declaratory statement and pre-emption claim, so that were the court below in the said case correct in its theory it could not affect this case, which thus meets the precise requirements which that court deems necessary.